(13)

No. 93-762-CFX
Status: GRANTED

Title: Jerome B. Grubart, Inc., Petitioner
v.
Great Lakes Dredge & Dock Company, et al.

Docketed:
November 15, 1993

Court: United States Court of Appeals for the Seventh Circuit

Vide:
93-1094

Counsel for petitioner: Harte,William, Barnow,Ben, Roberts Jr.,John G.

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NOTE: Opinion amended 10-7-93.

Entry	Date	Note	Proceedings and Orders
1	Nov 15 1993	G	Petition for writ of certiorari filed.
2	Dec 6 1993		Brief of respondent City of Chicago in opposition filed.
4	Dec 10 1993		Order extending time to file response to petition until February 5, 1994.
5	Jan 28 1994		Brief of respondent Great Lakes Dredge & Dock Company in opposition filed. VIDED.
6	Feb 2 1994		DISTRIBUTED. February 18, 1994 (Page 37)
24	Feb 9 1994		Reply brief of petitioner Jerome B. Grubart, Inc. filed.
7	Feb 22 1994		Petition GRANTED.
			**********
9	Mar 21 1994		Order extending time to file brief of petitioner on the merits until April 22, 1994.
10	Apr 15 1994		Joint appendix filed. VIDED.
11	Apr 22 1994		Brief amici curiae of National Conference of State Legislatures, et al. filed. VIDED.
12	Apr 22 1994		Brief of petitioner City of Chicago filed. VIDED.
13	Apr 22 1994		Brief of petitioner Jerome B. Grubart, Inc. filed. VIDED.
17	May 9 1994		Order extending time to file brief of respondent on the merits until June 6, 1994.
18	May 16 1994	G	Motion of petitioner City of Chicago for divided argument filed.
20	May 17 1994		Response by petitioner Jerome B. Grubart, Inc. to motion of petitioner City of Chicago for divided argument and for additional time for oral argument filed.
21	Jun 6 1994		Motion of petitioner City of Chicago for divided argument GRANTED. to be divided as follows: petitioner Jerome B. Grubart, Inc. - 15 minutes; petitioner City of Chicago - 15 minutes.
22	Jun 6 1994		Brief of respondent Great Lakes Dredge & Dock Company filed. VIDED.
23	Jun 6 1994		Brief amicus curiae of Maritime Law Association of the United States filed. VIDED.
25	Jul 11 1994		Reply brief of petitioner Jerome B. Grubart, Inc. filed. VIDED.
28	Jul 13 1994		Reply brief of petitioner City of Chicago filed. VIDED.
26	Jul 15 1994		CIRCULATED.

2 pp

No. 93-762-CFX

Entry	Date	Note	Proceedings and Orders
29	Jul 20 1994		SET FOR ARGUMENT WEDNESDAY, OCTOBER 12, 1994.(1ST CASE).
30	Aug 2 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit (BOX)

93-762

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,

Petitioner,

v.

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Seventh Circuit erred in holding, in conflict with other courts of appeals, that *Sisson v. Ruby*, 497 U.S. 358 (1990), forecloses consideration of the totality of the circumstances in the admiralty jurisdiction inquiry, and thereby extends admiralty law to situations where the injured parties and the instrumentalities have no maritime connections or attributes?

Does not the nexus prong of the *Sisson* test contemplate that the "activity" necessarily be defined differently from the "incident"?

LIST OF PARTIES

Petitioner, Claimant:

Jerome B. Grubart, Inc.

Respondent, Defendant:

Great Lakes Dredge & Dock Company

Defendant:

City of Chicago

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jerome B. Grubart, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this cause on August 24, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 3 F.3d 225 (1993). It appears at page 1 of the appendix ("App.").

The memorandum opinion of the United States District Court for the Northern District of Illinois, Eastern Division (C. Kocoras) has not been reported. It is reprinted at App. 22.

The order denying Petitioner's petition for rehearing with suggestion for rehearing *en banc*, and amending the Seventh Circuit opinion, is reprinted at App. 17.

JURISDICTION

Reacting to litigation against it in state court arising out of the Great Chicago Flood of 1992, Respondent brought this action in the United States District Court for the Northern District of Illinois invoking federal admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740. Respondent sought exoneration from or limitation of any liability it might incur from the claimants' state court actions. On February 18, 1993, the district court dismissed Respondent's complaint both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6). (App. 52).

On Respondent's appeal, the Court of Appeals for the Seventh Circuit, on August 24, 1993, reversed the district court's order and remanded the matter for further proceedings. (App. 1, 16). By order dated October 7, 1993, the Seventh Circuit denied Petitioner's petition for rehearing and amended its opinion of August 24th. (App. 17).

Petitioner's motion for a stay of the mandate pending the filing of its petition for certiorari was granted by the Seventh Circuit, and the mandate was stayed to and including November 15, 1993. (App. 20).

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

46 U.S.C. § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water.

. . .

STATEMENT OF THE CASE

Thousands of plaintiffs, including Petitioner, Jerome B. Grubart, Inc. ("Grubart"),[1] were included in the scope of the "Chicago Flood" class-action lawsuit against Respondent, Great Lakes Dredge & Dock Company ("Great Lakes"), in the Illinois state court. The complaint alleges that Great Lakes, while under contract to the City of Chicago ("City"), negligently removed and replaced pile clusters in the Chicago River juxtaposed to a bridge. Great Lakes performed the pile driving from a stationary barge in the river and its activities resulted in the rupture of an underground freight tunnel system ("Tunnel") owned by the City. The Tunnel is located under the riverbed at the pile driving site, traverses the downtown business district of Chicago popularly known as the Loop, and directly connects to a number of Loop buildings. On April

[1] Pursuant to Supreme Court Rule 29.1, petitioner states that there are no parent companies or subsidiaries of petitioner.

13, 1992, over six months after Great Lakes' work, river water cascaded into the Tunnel at the pile driving site and inundated the basements of numerous downtown buildings, including the two locations of Grubart. Grubart's two locations are typical of those of the class action plaintiffs in that they are located in the Loop, which is generally said to begin approximately six blocks from the area of the Tunnel breach.

On October 6, 1992, a few days before the period for filing an admiralty claim was to expire, Great Lakes filed a three-count complaint in federal district court seeking exoneration from or limitation of liability and, additionally, indemnity and contribution from the City for all losses and damages occasioned and incurred from the breach of the Tunnel. The complaint alleged admiralty jurisdiction pursuant to 28 U.S.C. § 1333 and the Admiralty Extension Act, 46 U.S.C. § 740. Upon the filing of that complaint, Great Lakes received a stay from the district court against all actions filed against it arising out of the Tunnel disaster.

Grubart filed its Claim and Answer in the admiralty action on November 6, 1992. Grubart and the City thereafter moved to dismiss Great Lakes' admiralty complaint. On February 18, 1993, the district court dismissed Great Lakes' admiralty complaint, concluding that its consideration of the totality of the circumstances "lead[s] unyieldingly" to the conclusion that the specialized set of rules invoked by application of federal admiralty jurisdiction is unnecessary. (App. 39). The district court held that it did not have subject matter jurisdiction and that Great Lakes' complaint failed to state a claim upon which relief could be granted.

On March 16, 1993, the Seventh Circuit denied Great Lakes' emergency motion for an extension of a Rule F(3)

admiralty stay but granted its motion for an expedited appeal. On appeal to the Seventh Circuit, Great Lakes contended that the district court misapplied the Supreme Court's most recent test for admiralty jurisdiction under 28 U.S.C. § 1333(1) by considering factors irrelevant to the jurisdictional analysis. Great Lakes also argued that the district court misconstrued the purpose of the Admiralty Extension Act, 46 U.S.C. § 740, when the court refused to invoke the act to extend admiralty jurisdiction to cover the substantial damages occurring on land.

In regard to the jurisdictional issue, the Seventh Circuit ruled that the district court erred by engaging in a policy analysis and examining the "totality of the circumstances." (App. 6-7). According to the Seventh Circuit, the district court should have limited itself to answering the three questions under this Court's *Sisson* test: (1) Did the alleged wrong occur on navigable waters of the United States? (2) Did it pose a potential hazard to maritime commerce? (3) Was it substantially related to traditional maritime commerce? (App. 6). The Seventh Circuit also invoked the Admiralty Extension Act in response to Grubart's objection that most of the damage occurred some distance from the river. (App. 8-9, & n. 5). The court, in a footnote, further concluded that the Extension Act seemed to cover this situation even if the instrumentalities or entities before it were not all engaged in the same activity. (App. 9, n. 5).

Grubart petitioned for rehearing on the grounds that the Seventh Circuit's analysis conflicted with that of the other circuits, which explicitly provide for consideration of factors such as those identified by and relied upon by the district court. By disregarding these facts, the Seventh Circuit had ignored the Supreme Court's admonition that

its *Sisson* test was capable of further refinement when the entities involved were not all engaged in the same activity, the situation presented by this matter. Grubart also argued that the Seventh Circuit erred by equating the "activity" and "incident" components of the *Sisson* nexus test. The Seventh Circuit denied this petition and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

In reaching its decision that admiralty jurisdiction applies to this matter, the Seventh Circuit misconstrued this Court's admiralty jurisdiction test established in *Sisson v. Ruby*, 497 U.S. 358 (1990), by focusing solely on the three individual components of that test while ignoring the substantial federal policy interests underlying the application of admiralty jurisdiction. The Seventh Circuit's exclusive application of the *Sisson* prongs conflicts with the decisions of most, if not all, other circuits which continue to address these policy considerations while interpreting the *Sisson* test. *See e.g., Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131 (4th Cir. 1991); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636 (11th Cir. 1992); *see also, Eagle-Picher Industries, Inc. v. U.S.*, 937 F.2d 625 (D.C. Cir. 1991). Significantly, the Seventh Circuit's mechanical approach tramples over any prospect of recognizing, let alone addressing, the inequities involved in imposing admiralty jurisdiction and substantive admiralty law on thousands of entities and individuals not remotely engaged in a maritime activity. The factual configuration in the instant matter—the parties being engaged in different activities—was not before the Court in *Sisson*

or any of its predecessors, a fact *Sisson* explicitly noted could require further refinement of the jurisdiction test. *Sisson*, 497 U.S. at 365-366, nn. 3-4.

In addition, the Seventh Circuit's invocation of the Admiralty Extension Act (46 U.S.C. § 740) ("Extension Act") to bootstrap its admiralty jurisdiction decision exemplifies the difficulty created by its myopic application of the *Sisson* formula. Other circuits have established that the Extension Act does not expand the traditional maritime activities which give rise to an admiralty claim; the Seventh Circuit's use of the Extension Act to create admiralty jurisdiction runs counter to this weight of authority and the legislative purpose behind the enactment. *See, e.g., Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124 (5th Cir. 1987), *cert. denied*, 484 U.S. 944 (1989); *Jorsch v. Le Beau*, 449 F. Supp. 485 (N.D. Ill. 1978); *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103 (E.D. La. 1993); *Felix v. Arizona Dept. of Health Services*, 606 F. Supp. 634 (D. Ariz. 1985). Absent review and reversal by this Court, the Seventh Circuit's forced application of *Sisson*, and its untenable amplification of the Extension Act, will create confusion and perpetrate further injustices in innumerable future cases where parties not engaging in a maritime activity are swept into the maelstrom of admiralty law.

I. THE SEVENTH CIRCUIT'S MECHANICAL APPLICATION OF THE ADMIRALTY JURISDICTION TEST IS IN CONFLICT WITH FEDERAL AND STATE COURT DECISIONS ON THE SAME MATTER AND APPLICABLE DECISIONS OF THIS COURT

The *Sisson* admiralty jurisdiction test was refined over the last two decades in a trilogy of cases starting with *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S.

249 (1972), extending through *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and ending with *Sisson*. The *Executive Jet* case clarified that in order for a claim to be cognizable in admiralty, the injury must occur on navigable waters (situs test) and the activity must bear a sufficient relationship to maritime commerce (nexus test). *Executive Jet*, 409 U.S. at 268. In *Foremost*, this Court held that a maritime activity need not bear a substantial relationship to a commercial activity so long as it had a potential impact on maritime commerce. *Foremost*, 457 U.S. at 674-675. *Sisson* further refined the nexus part of the test by adding that: (1) the incident giving rise to the claim must have the potential to disrupt maritime commerce; and (2) the activity giving rise to the incident must have a substantial relationship to maritime activity. *Sisson*, 497 U.S. at 362-364. This progression by the Supreme Court has as its primary focus the federal interest in the protection of maritime commerce.

In *Sisson*, the Supreme Court declined to provide more explicit guidance for the second dimension of the nexus test—whether an activity is substantially related to traditional maritime pursuits. It recognized, indeed listed, the various "totality of the circumstances" tests used by the circuits to interpret this prong but did not overrule them. *Sisson*, 497 U.S. at 365-366, n. 4.[2]

After *Sisson*, the various circuits did not abandon their maritime nexus tests. The Third Circuit follows the same four-part inquiry used by the Fifth Circuit before *Sisson*. These four criteria are:

[2] This Court, in yet another area of the law, has recognized, established, and reaffirmed the importance of "looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 1993 U.S. LEXIS 7155, *10 (1993).

(1) the functions and roles of the parties,

(2) the types of vehicles and instrumentalities involved,

(3) the causation and type of injury, and

(4) traditional concepts of the role of admiralty law.

Sinclair v. Soniform, Inc., 935 F.2d 599, 602 (3d Cir. 1991). This is the original, widely-followed Fifth Circuit *Kelly* test (*Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973)) discussed in *Sisson*. *Sisson*, 497 U.S. at 365-366, n. 4. The Fifth Circuit still adheres to its *Kelly* test. *Earl Wayne Coats v. Penrod Drilling Corp.*, 1993 U.S. App. LEXIS 27019, *21 (5th Cir. 1993); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 440 (5th Cir. 1991).

The Fourth, Ninth, and Eleventh Circuits also continue to abide by the four-part *Kelly* test after *Sisson* except that the Fourth and Ninth Circuits have modified their analysis with principles established by the Supreme Court. *Price v. Price*, 929 F.2d 131, 135-136 (4th Cir. 1991) (analysis of four factors tempered by traditional concern of admiralty law for torts arising out of navigational errors); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1263 (9th Cir. 1993) (four-factor test valid except that causation aspect dropped in view of *Sisson*); *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993) ("fourth element excludes causation and is limited to the nature of the injury after *Sisson*"). *See also, Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636, 640-642 (11th Cir. 1992); *Cochran v. E.I. DuPont de Nemours*, 933 F.2d 1533, 1538-1539 (11th Cir. 1991), *cert. denied*, 116 L. Ed.2d 785 (1992).[3]

[3] State courts also follow the *Kelly* test. *See, e.g., Bias v. Tidewater Marine Service, Inc.*, 612 So.2d 927, 929 (La. App. 1993);

(Footnote continued on following page)

Using a *Kelly*-like analysis in the context of the *Sisson* requirements, the district court found that "[t]here are no traditional maritime concerns present here. . . ." (App. 40), based on its acceptance of the following facts in this matter:

1. None of the vessels were directly involved in the cause of the injury to the tunnel wall and did not strike anything to cause the harm in question.
2. The vessels were acting as fixed platforms and were not involved in navigation on a waterway during the pile driving activities.
3. The injuries were not sustained on a dock or pier next to the site of the work activity, but were experienced on land, blocks away in Chicago's business district.
4. Pile driving is a common construction activity and is found in both maritime and non-maritime settings. The principal purpose of the placement of the dolphins at the Kinzie Street site [the pile driving site] was the protection of the bridge, which the Supreme Court views as an extension of land.
5. The pile driving activity did not present a foreseeable or material disruption of maritime commerce on the Chicago River. The actual effect on commerce took place many months after the alleged wrongful acts and were part of the massive remediation efforts engaged in by the City and others.

[3] *continued*
Fox v. Southern Scrap Export Co., Ltd., 618 So.2d 844, 847 (La. 1993). *But see, Torres v. City of New York*, 581 N.Y.S.2d 194, 204, 177 A.D.2d 97 (N.Y.App.Div. 1992), *cert. denied*, 123 L. Ed.2d 151 (1993) (the tests of the various federal courts of appeals "have, in our view, not led to satisfactory results").

6. There are no allegations of personal injury on a vessel on navigable waters, nor for damage done to a vessel in navigation or its cargo.

(App. 38-39).

In contrast, the Seventh Circuit's application of the *Sisson* inquiry broadens the scope of admiralty jurisdiction beyond any sense of reason, tradition, or pronouncement, direct or indirect, by this Court:

> We believe that, following *Sisson*, the jurisdictional inquiry must be more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision. Similar policy analysis would likely have yielded a different result in *Sisson* itself . . . *A court, therefore, may only ask the three questions posed above*, which we now consider seriatim.

(App. 7) (emphasis added). This completely misconstrues the direction of the Supreme Court's development of the admiralty jurisdiction test. There is no precedent in *Sisson* or the earlier Court cases for departing from a policy analysis in the admiralty jurisdictional inquiry. Rather, *Sisson* demands that a court not become fixated on the three parts of the *Sisson* jurisdictional analysis to the exclusion of the underlying federal interests of admiralty law:

> [T]he demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far. In *Foremost*, the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction.
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> * * *

Sisson v. Ruby, 497 U.S. at 364, n. 2 (citation omitted). Nevertheless, the Seventh Circuit asked only the three questions posed by the *Sisson* test; its reasoning appears to be an overreaction to the Supreme Court's reversal of the Seventh Circuit's previous view of what constitutes a "traditional maritime activity." *See In re Complaint of Sisson*, 867 F.2d 341, 345 (7th Cir. 1989) (the activity must be commercial or involve navigation), *rev'd*, *Sisson v. Ruby*, 497 U.S. 358 (1990). By eschewing a policy analysis such as that engaged in by the district court, the Seventh Circuit subverted the purposes behind the *Sisson* Court's directive.

Had the "totality of the circumstances" properly been considered in this matter, using the *Kelly* test or some other analogous standard, the parties would undoubtedly be in state court applying traditional common law rules of tort and contract, questions which are traditionally committed to local resolution. Instead, the Seventh Circuit's ruling has brought tens of thousands of individuals and businesses having no connection with a maritime activity into the jurisdiction of the federal courts because one party, the tortfeasor, happened to be working from a stationary barge on a river. Over-reliance on those facts harkens back to the old strict locality test from which this Court has spent decades retreating, for good reason. The national interest to be served by application of admiralty law, "uniformity of law and remedies for those facing the hazards of waterborne transportation" (*Kelly*, 485 F.2d at 526; *see also*, *Foremost*, 457 U.S. at 676-677), does not exist when the maritime elements are, at most, incidental and tangential to the nature of the tort claims and land-based elements of this calamity. In any event, the Seventh Circuit did not intimate that a federal interest motivated its application of admiralty jurisdiction here.

The Seventh Circuit's disregard for the examination specified by the *Kelly*-like tests in favor of a mechanical and stripped application of *Sisson* is a distinct deviation from the practice of the other circuits which have consistently incorporated a *Kelly* analysis in the *Sisson* test. Consideration of the *Kelly* elements at least allows a court to take into account the varying activities of the parties. Although the District of Columbia Circuit believes that the test to be used for the second part of the *Sisson* nexus prong is an unsettled question of law (*Eagle-Picher Industries, Inc. v. U.S.*, 937 F.2d 625, 633, n. 7, (D.C. Cir. 1991)), and although other circuits also appear to harbor some doubt about the nexus prong even while they apply their totality of the circumstances tests to the *Sisson* requirements,[4] their reaction has been one of reconciliation of the established circuit tests with the *Sisson* test rather than abandonment. In contrast, the Seventh Circuit's disregard of the important factual elements in this matter leads to no consideration of the activities of the parties or the instrumentalities involved. This approach conflicts with the clear mandate of this Court that such an issue might have a bearing on the jurisdictional inquiry and, consequently, it is implicit in the *Sisson* analysis that such factors be considered.

Only this Court can clear up the uncertainty which exists in the application of *Kelly*-like factors to the *Sisson* test,

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[4] After *Sisson*, the Fifth Circuit stated that "[i]n the absence of further guidance from the Court, we will continue to follow the *Kelly* approach and our cases applying it." *Broughton Offshore Drilling v. South Cent. Mach.*, 911 F.2d 1050, 1052 (5th Cir. 1990). *See also*, *In re Complaint of Bird*, 794 F. Supp. 575, 581, n. 9. (D. S.C. 1992) ("The nexus test as defined in *Sisson* . . . will invite confusion and inconsistent application on the part of lower courts seeking to apply it.").

especially when one injects the impact of parties not involved in a maritime activity into the jurisdictional inquiry. In addition to facing the injustice of a possible limitation action by Great Lakes brought under the Vessel Owner's Limitation of Liability Act (46 U.S.C. § 181 *et seq.*), imposition of admiralty jurisdiction in this matter also could deprive the injured litigants of the right to a jury trial. *See Complaint of Great Lakes Towing Company*, 395 F. Supp. 810, 813 (N.D. Ohio 1974); *Luhr Bros. Inc. v. Gagnard*, 765 F. Supp. 1264, 1267 (W.D. La. 1991). The federal interest in applying admiralty jurisdiction must be weighed against the constitutional interests of parties having no relation to a maritime activity being saddled with admiralty jurisdiction and the complications and limitations which follow.

II. THE SEVENTH CIRCUIT'S APPLICATION OF THE ADMIRALTY EXTENSION ACT IS IN CONFLICT WITH FEDERAL DECISIONS ON THE SAME MATTER

This Court in *Sisson* realized that the type of factual situation presented in the instant matter could require additional refinement of the admiralty jurisdictional formula. 497 U.S. at 365-366, nn. 3-4. The Seventh Circuit's solution to the dilemma posed by the substantial number of non-maritime litigants and facts involved in this matter was to invoke the Admiralty Extension Act (46 U.S.C. § 740):

> Grubart points to language the Supreme Court used in a footnote in *Sisson*: "Different issues may be raised in a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely addresses them" . . . Grubart suggests that this is such a case. If we were to adopt such a view in this case, however, we would render the Admiralty Extension Act meaningless. That act seems explicitly to address situations, like this one, where the injury-causing activity occurs on a vessel on a navigable waterway but the injury itself is felt on land.

(App. 9, n. 5) (citations omitted). One of the most disquieting aspects of the Seventh Circuit's statement is its facial simplicity. The Seventh Circuit's position renders the *Sisson* Court's footnotes meaningless. Considering that the *Sisson* test took decades to formulate, and developed against the backdrop of the Extension Act, the measured path of the admiralty jurisdiction test should not be derailed by a rogue application of the Extension Act in an appellate court footnote.[5]

The federal courts have stated that the Extension Act does not expand admiralty jurisdiction nor widen the traditional maritime activities which give rise to an admiralty claim. *See Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124, 125 (5th Cir. 1987), *cert. denied*, 484 U.S. 944 (1989); *Jorsch v. Le Beau*, 449 F. Supp. 485, 488-489 (N.D. Ill. 1978); *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103, 1115 & n. 26 (E.D. La. 1993); *Felix v. Arizona Dept. of Health Services*, 606 F.

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[5] Perhaps the Seventh Circuit's statement that Grubart's argument would "render the Admiralty Extension Act meaningless" deserves more scrutiny. It is not implausible that modern judicial developments in this area have overtaken the statutory enactment. A proper analysis of the *Sisson* test which takes into account the totality of the circumstances should also solve the problems which the Extension Act sought to remedy. The Extension Act was enacted in 1948 when the locality of the wrong was the controlling, if not sole, consideration in applying admiralty jurisdiction. *See Executive Jet*, 409 U.S. at 260. *See also, Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 810 (5th Cir. 1989) ("[t]he legislative history of the Admiralty Extension Act demonstrates that its purpose was to correct such anomalies of the strict locality test. . . .").

Supp. 634, 636 (D. Ariz. 1985). Consequently, the Seventh Circuit should not have interjected the Extension Act into the midst of its *Sisson* analysis. (App. 8-9).[6] By doing so, it bootstrapped the threshold *Sisson* jurisdictional inquiry and, in effect, improperly created a cause of action through the Extension Act rather than through the *Sisson* test. *See Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 811 (5th Cir. 1989) (Extension Act cannot provide a separate basis for application of maritime law, citing act's Senate Report).

The Seventh Circuit's application of the Extension Act is further evidence of the improper, perfunctory jurisdictional inquiry it employed. The appellate court reproached the district court for considering the totality of the circumstances and then proceeded to apply a stifling interpretation of the *Sisson* test that dismissed the relevancy of the many facts found troubling by the district court. When Grubart directly confronted the appellate court with the *Sisson* admonition about the significance of having non-maritime entities and activities involved, the Seventh Circuit still refused to address the relevance of those circumstances and their potential impact on its interpretation of the *Sisson* test. Instead, it avoided an examination of those aspects by invoking the Admiralty Extension Act (and improperly at that) and washing its hands of the matter.

[6] The Seventh Circuit's reliance on the Extension Act in this matter is further clouded by the fact that neither Great Lakes' barge nor a defective appurtenance caused the accident. In order to invoke maritime jurisdiction under the Admiralty Extension Act, "[t]he vessel or its defective appurtenances must be the proximate cause of the accident." *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973, 975 (5th Cir. 1987); *see also, Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 260, n. 8 (1972).

The Seventh Circuit's misapplication of *Sisson* and the Extension Act works a terrible injustice on thousands of parties with no maritime connection and permits an alleged tortfeasor potentially to escape major liability when no federal interest in an admiralty adjudication has been implicated. It is time for this Court to answer its own question about the factual situation not presented in *Sisson* and to address squarely whether, and how, admiralty jurisdiction applies when none of the injured parties was engaging in a maritime pursuit.

III. THE SEVENTH CIRCUIT MISAPPLIED THE NEXUS PRONG OF THE *SISSON* TEST

The existence of admiralty jurisdiction is, as the Seventh Circuit recognized, embodied in the three-pronged test contained in *Sisson*. In order for admiralty jurisdiction to attach, "all three questions [must be] answered in the affirmative." (App. 6).

In *Sisson*, the "incident" was a fire, whereas the storage and maintenance of vessels in a marina was the "activity." *Sisson*, 497 U.S. at 362. In *Foremost*, the "incident" was the collision of vessels, while the "activity" was navigation in general of vessels. *Foremost*, 457 U.S. at 675. Implicit in the *Sisson* analysis is that the "activity" bearing a substantial relationship to a traditional maritime activity differ from the "incident" giving rise to the claim.

In striving to conform the facts in the instant matter to the required *Sisson* nexus analysis, the Seventh Circuit defined the "incident" posing a potential hazard to maritime commerce as "the installation of pilings from barges located in the navigable channel." (App. 9). Similarly, the court characterized the "activity" ostensibly having a relation to maritime commerce as "the sinking of

pilings into a riverbed." (App. 10). In spite of the artifice used by the Seventh Circuit to differentiate the "activity" from the "incident" in this matter, they are, in fact, descriptive of the identical conduct. The court merely added two elements required and found to exist for the *situs* test, "vessel" and "navigable waters" (App. 7-9), and erroneously reintroduced them as the decisive factual components of the *nexus* test. The net result is an illusory distinction between "incident" and "activity" crafted to fit the facts to the court's crabbed *Sisson* analysis.

This misidentification of the "incident" led to the Seventh Circuit's insupportable conclusion that there was an actual disruption to commerce arising out of the incident:

> This is not a case, like *Foremost* or *Sisson*, in which we must imagine the various ways in which the installation of pilings might disrupt travel on the river. Because commerce on the river was *actually* disrupted for more than a month, this question answers itself. Yes, there was such a potential. In fact, it was realized.

(App. 9-10).

It is undisputed that the alleged harm in this disaster was the breach of the underground freight Tunnel. When defined correctly, the only conclusion one can make is that the Tunnel breach, like the fire in *Sisson*, is the "incident," and that, in this case, it did not have the potential to disrupt maritime commerce. The jurisdictional inquiry does not turn on the particular facts of the incident; here, the source or cause of the Tunnel breach. *See Sisson*, 497 U.S. at 365. Therefore, it does not matter for this part of the *nexus* test how the pilings were installed.

The Seventh Circuit's definition of the activity, *i.e.*, "the sinking of pilings into a riverbed", cannot be used to determine whether that constituted a potential hazard to maritime commerce. The Supreme Court did not refer to navigation in general (*Foremost*) or the storage of vessels in a marina (*Sisson*) as the conduct to analyze in assessing whether there was an actual or potential effect on maritime commerce. Obviously, the Supreme Court did not look to the "activity" for that part of the inquiry, for the answer would always be in the affirmative; if the conduct is defined in general terms as the "activity" invariably is, there will *always* be a theoretical, potential hazard to maritime commerce arising from it. Such a result would negate the need for any further inquiry and create a simple one-part *nexus* test in which a potential adverse effect on maritime commerce can simply be assumed. The Court explicitly rejected a suggestion to dispense with this part of the test. *See Sisson*, 497 U.S. at 364, n. 2.

None of the parties, including Great Lakes, claimed that the Tunnel breach posed a potential hazard to maritime commerce. Whatever impairment or rerouting of river traffic occurred was the result of repair efforts to the Tunnel chosen by the City and the U.S. Army Corps of Engineers after the accident. It was a discretionary decision on their part which led to a planned closing of part of the river and the closing had nothing to do with the barge or the pile driving activity. The Seventh Circuit, elsewhere in its Opinion, would "not allow the fortuitous existence of an elaborate tunnel system . . . to defeat jurisdiction." (App. 9); *see also, Executive Jet*, 409 U.S. at 268 ("These [fortuitous circumstances] are hardly the types of distinctions with which admiralty law was designed to deal"). Consequently, the Seventh Circuit should

not have relied on the fortuitous choice of repair efforts by the City and the Army Corps of Engineers six months after the tortious conduct to create admiralty jurisdiction.

It is also significant that none of the trilogy of Supreme Court cases mentioned the post-accident repair or rescue efforts which must have transpired in those cases and which are a necessary by-product of virtually any accident. Those events obviously had no role in the Supreme Court's formulation and application of the admiralty jurisdiction tests. It also has no relevance to this case.

By making the "activity" the same as the "incident," the Seventh Circuit further betrayed the *Sisson* test and found admiralty jurisdiction when a proper application of *Sisson's* three prongs would have found jurisdiction wanting. The Seventh Circuit selectively accepted fortuitous circumstances to reach its desired result. For the reasons stated in Sections I and II, *supra*, this is further expression of the Seventh Circuit's confusion about the proper implementation of the *Sisson* test and the domain of admiralty law. The issues presented by this litigation are insufficient to justify federal courts supplanting state law with the federal law of admiralty.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1421

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant-Appellee,

and

JEROME B. GRUBART, INC., an Illinois Corporation,

Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—**Charles P. Kocoras**, *Judge.*

ARGUED APRIL 26, 1993—DECIDED AUGUST 24, 1993

Before CUDAHY and EASTERBROOK, *Circuit Judges*, and EISELE, *Senior District Judge.**

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* Hon. Garnett Thomas Eisele, of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

CUDAHY, *Circuit Judge.* On April 13, 1992, the Chicago River "sprung a leak." Mike Royko, *Putting in a Plug for the City that Leaks*, Chi. Trib., Apr. 14, 1992, at 3. On that date, a breach occurred in the roof of a freight tunnel running beneath the river. Water rapidly filled that tunnel and spread to the web of tunnels located throughout the city's downtown area. A number of buildings connected to this tunnel system were flooded and seriously damaged. Business in Chicago's downtown district was disrupted for many days as was maritime traffic on the portion of the river near the rupture in the tunnel wall.[1] Shortly after the leak was plugged, thousands of plaintiffs, including individuals, businesses and the City of Chicago (the City), filed suit in the Cook County Circuit Court against Great Lakes Dredge & Dock Company (Great Lakes), a contractor hired by the City to replace pile clusters (known in the trade as "dolphins") at five bridge sites along the Chicago River.[2] These claimants, for the most part, allege that Great Lakes negligently installed dolphins in the vicinity of the Kinzie Street Bridge and, as a result, caused the breach in the tunnel which, in turn, caused the flood.

On October 6, 1992, Great Lakes filed a three-count complaint in the district court, claiming the existence of federal admiralty jurisdiction. Count I demands exoneration from or limitation of liability pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §§ 181-96 (the Limitation Act). In Counts II and III, Great Lakes requests indemnity or contribution from the City for any

[1] To assist repair, the Captain of the Port of Chicago ordered the river closed, for more than a month, between Grand Avenue on the North Branch, Cermak Road on the South Branch and Lake Michigan on the Main Branch.

[2] These lawsuits have been (and continue to be) assigned to a single judge and consolidated under the caption *In re Chicago Flood Litigation*, No. 92 L 5422.

damages that Great Lakes may be adjudged liable to pay.[3] Great Lakes contends that the City alone was responsible for the flood either because it failed to disclose to Great Lakes the existence of the tunnel near the Kinzie Street Bridge or because it failed to adequately repair and maintain the tunnel. Jerome B. Grubart, Inc. (Grubart), a downtown business which allegedly suffered damage as a result of the flood, filed a claim in the federal proceeding. The City and Grubart moved the district court to dismiss Great Lakes' complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The district court granted these motions. Great Lakes appeals, and we, considering the matter *de novo*, now reverse.

Article III, section two of the United States Constitution provides that "the judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiction," and 28 U.S.C. § 1333(1) places such power exclusively within the jurisdiction of the United States district courts. Our first task is to determine whether the tort at the heart of this litigation, Great Lakes' alleged negligence, is within the admiralty jurisdiction. We conclude that it is.

Before the last twenty years, admiralty jurisdiction over torts turned on the satisfaction of a so-called "locality" (or "situs") test. Under this test, "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865). This principle, however, never took the form of a holding of the Supreme Court, and, as early as 1850 the author of a noted treatise on admiralty law expressed doubt that admiralty jurisdiction depended solely on a maritime location. He suggested that admiralty jurisdiction existed, in tort cases, only if the tort bore some relationship to navi-

[3] Counts II and III were added by way of impleader pursuant to Fed. R. Civ. P. 14(a) & (c).

gation or maritime commerce. *See* Erastus C. Benedict, The Law of American Admiralty 173 (1850). The Supreme Court, however, did not squarely address this issue until 1972. Nonetheless, generations of admiralty practitioners and students believed that the locality test alone was controlling.

In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), an aircraft crashed into the navigable waters of Lake Erie after striking a flock of sea gulls while taking off. The Court held that there was no admiralty jurisdiction, despite the existence of a maritime situs, because "the wrong [did not] bear a significant relationship to traditional maritime activity." *Id.* at 268. Although the Court explicitly limited the application of this new "nexus" requirement to cases involving aviation torts, some courts applied it more broadly. *See, e.g., Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

Ten years after *Executive Jet*, the Supreme Court first said, although technically in dictum, that the "nexus" requirement was not moored to aviation disasters. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a case involving the collision of two pleasure boats in navigable waters, the Court expanded its holding in *Executive Jet* in two ways. First, the "requirement that the wrong have a significant connection with traditional maritime activity" was incorporated into all assertions of maritime tort jurisdiction. *Id.* at 674. Second, the Court concluded that "traditional maritime activity" was not limited to *commercial* maritime activity. *Id.* The Court found that the "federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity." *Id.* at 674-75. It was enough, therefore, for purposes of sustaining admiralty jurisdiction, that the collision in *Foremost* had a "potentially disruptive impact" on maritime commerce. *Id.* at 675.

After *Foremost*, many courts, prominently including this one, grappled with the precise meaning of the "nexus"

requirement. The Supreme Court provided additional guidance in *Sisson v. Ruby*, 497 U.S. 358 (1990), *rev'g Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989) (Cudahy, J.). In *Sisson*, a fire erupted in the washer/dryer unit of a large pleasure yacht docked at a recreational marina on Lake Michigan, a navigable waterway. The fire spread to other recreational vessels and the marina itself. No commercial vessels were damaged since none were docked at the marina at the time of the fire (nor were any ever likely to be docked there). In reversing this Circuit to find admiralty jurisdiction, the Court bifurcated its analysis of the "nexus" requirement. The Court began by assessing the relationship between admiralty jurisdiction and the disruption of maritime commerce. The Court stated that the jurisdictional inquiry does not require an assessment of the incident's actual effects on maritime commerce. Rather, admiralty jurisdiction can exist if an incident creates a "*potential* hazard to maritime commerce," even though maritime commerce is in no way disturbed. *Id.* at 362 (quoting *Foremost*, 457 U.S. at 675 n.5 (emphasis supplied)). Moreover, in determining the existence of such a "potential hazard," a court does not consider the particular facts of the case before it, but "must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Id.* at 363. The Court concluded that the fire in *Sisson* "plainly satisf[ied]" this requirement, presumably because it could have damaged commercial vessels, had any been docked at the recreational marina at the time, or because the damage to the marina itself might have disturbed commercial maritime traffic.[4] *Id.* This seemingly rather remote

[4] Alternatively, perhaps the Court concluded that aquatic recreation *is* commerce. No one who has been to Disney World can doubt that recreation is big business. Seventy years ago, the Supreme Court reasoned that baseball, being a recreation, is not commerce and therefore is exempt from the federal antitrust laws. *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). Although the Court has never disturbed base-

(Footnote continued on following page)

possibility of impact on maritime traffic appeared to be enough to support admiralty jurisdiction.

The Court also reiterated its holding in *Foremost* that admiralty jurisdiction does not exist, notwithstanding an incident's potential impact on maritime commerce, unless there is "a substantial relationship between the activity giving rise to the incident and traditional maritime activity." *Id.* at 364. The Court stressed that the relevant activity is "defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." *Id.* Accordingly, the Court characterized the relevant conduct in *Sisson* as "storage and maintenance of a boat at a marina on navigable waters." *Id.* at 365. Since this is a "common, if not indispensable, maritime activity," the Court concluded that admiralty jurisdiction did exist. *Id.* at 366.

After *Sisson*, in ascertaining the existence of admiralty jurisdiction we ask three questions about the incident giving rise to the alleged wrong: (1) did it occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity? If all three questions are answered in the affirmative, a claim arising out of the incident falls within the admiralty jurisdiction. The district court, although clearly cognizant of the *Executive Jet*, *Foremost* and *Sisson* trilogy, used a "totality of the circumstances" test, first articulated by the Fifth Circuit seventeen years before *Sisson* was decided, in assessing the existence of admiralty jurisdiction. *Great Lakes Dredge & Dock Co. v. City of Chicago*, No. 92 C

[4] *continued*
ball's antitrust exemption, it has, in recent years, acknowledged that "baseball is a business and it is engaged in interstate commerce." *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). We can, therefore, speculate that the fire in *Sisson* was a potential hazard to maritime commerce because it, or more accurately, fires on pleasure boats generally, are likely to disrupt recreational activities on the water.

6754, slip op. at 14, (N.D. Ill. Feb. 18, 1993) (hereinafter Mem. Op. & Ord.) (citing *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973)). The court also stated,

> Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules.

Mem. Op. & Ord. at 20. We believe that, following *Sisson*, the jurisdictional inquiry must be much more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision. Similar policy analysis would likely have yielded a different result in *Sisson* itself. *See, e.g.*, D.T. Plunkett, Sisson v. Ruby, *Muddying the Waters of Admiralty Jurisdiction*, 65 Tul. L. Rev. 697 (1991); Phyllis D. Carnilla & Michael P. Drzal, Foremost Insurance Co. v. Richardson: *If This is Water, It Must be Admiralty*, 59 Wash. L. Rev. 1 (1983). A court, therefore, may only ask the three questions posed above, which we now consider seriatim.

Turning first to the "locality" requirement, we note that a tort occurs on navigable waters when its " 'substance and consummation' take place there," even though the allegedly negligent act itself occurred on land. 1 Benedict on Admiralty § 172 at 11-32 (7th ed. 1991) (quoting *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865)). There can be no doubt that the Chicago River, and all of its branches, is a navigable waterway of the United States. *See Escanaba Co. v. City of Chicago*, 107 U.S. 678, 683 (1883). Nor is there any dispute that Great Lakes' vessels were located in the navigable "channel" of the Chicago River while engaged in the removal and replacement of the pile clusters. Hence, it follows that the alleged tort—the negligent driving of pilings into the riverbed—occurred on a navigable waterway. It is of no consequence that the piling clusters were located outside of the navigable "channel," since the

navigable waterway extends from shore to shore. *See Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 263 (1915).

The City and Grubart make much of the fact that most of the damage in this case occurred on land far from the river. But the Admiralty Extension Act provides that the admiralty jurisdiction "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740. The City and Grubart dispute the applicability of this provision on two grounds. First, they suggest that the barges from which Great Lakes operated are not "vessels" because they were, at that time, being used as stationary platforms. We have stated, however, that a craft is a "vessel" if its purpose is to some reasonable degree "the transportation of passengers, cargo, or equipment from place to place across navigable waters." *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). There is no doubt that Great Lakes' barges are capable of, and have performed, such transportation functions. Accordingly, they are "vessels." Second, the City suggests that 46 U.S.C. § 740 is inapplicable because the damage to the downtown businesses was felt at a time and place too "remote from the wrongful act." *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963). We must reject these contentions. We believe that the requirement of temporal proximity is nothing more than a specialized rule of proximate causation. And we do not believe that the elapse of six months, the period of time between Great Lakes' completion of its work and the flood, bars application of the Admiralty Extension Act.

Gutierrez itself illustrates why the Admiralty Extension Act comprehends the damage asserted in this case notwithstanding the fact that it was felt some distance from the river. In *Gutierrez*, a cargo of beans was packed aboard a ship in broken and defective bags. While the beans were being unloaded, some spilled out of the bags onto the surface of the pier. A longshoreman slipped on some of these

loose beans and was injured. Applying 46 U.S.C. § 740, the Court found the existence of admiralty jurisdiction. A similar result is indicated in the present case. Here water, like the beans, spilled into the freight tunnel through a breach allegedly caused by Great Lakes' negligence. We will not allow the fortuitous existence of an elaborate tunnel system, which simply transported the moving water away from the original breach and spread the damage, to defeat jurisdiction.[5] In sum, therefore, the incident satisfies the "locality" requirement.

Our next inquiry is whether the incident posed a potential hazard to maritime commerce. We are led to ask: Did the installation of pilings from barges located in the navigable channel of the Chicago River create a potential to disrupt commercial maritime activity?[6] This is not a case, like *Foremost* or *Sisson*, in which we must imagine the various ways in which the installation of pilings might disrupt travel on the river. Because commerce on the river was *actually* disrupted for more than a month, this ques-

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[5] Grubart argues that there is no jurisdiction here because, even if Great Lakes' activities were traditionally maritime, the injured parties were not engaged in maritime activity. Grubart's Br. at 32-37. Grubart points to language the Supreme Court used in a footnote in *Sisson*: "Different issues may be raised in a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely addresses them." 497 U.S. at 365 n.3. Grubart suggests that this is such a case. If we were to adopt such a view in this case, however, we would render the Admiralty Extension Act meaningless. That act seems explicitly to address situations, like this one, where the injury-causing activity occurs on a vessel on a navigable waterway but the injury itself is felt on land.

[6] This is not the first case in which tunnels under the Chicago River have been the subject of litigation. In *West Chicago St. R.R. Co. v. Illinois ex rel. Chicago*, 201 U.S. 506, 521 (1906), for example, one such tunnel was itself found to be "an obstruction to free navigation on the river."

tion answers itself. Yes, there was such a potential. In fact, it was realized.[7]

Finally, we must determine if the activity in which Great Lakes was engaged is substantially related to traditional maritime activity. Great Lakes' activity at the time it allegedly caused, or precipitated, the flood may be described, in the most general terms, as the sinking of pilings into a riverbed. The parties make strenuous efforts to establish the purpose served by the particular dolphins that Great Lakes was hired to install. The City and Grubart contend that they were intended exclusively to protect the nearby bridges. Great Lakes concedes that this was one of their purposes but maintains that they were also designed to protect ships that collide with the bridges and to serve as navigation aids. But we need not resolve this debate, because we are concerned only with "the general character of the activity." *Sisson*, 497 U.S. at 365. There is no dispute that dolphins are capable of, and *generally* do, serve all of the purposes mentioned, two of which, protecting ships from collisions with bridges and aiding navigation, are unquestionably related to maritime activity. It follows logically that the installation of dolphins relates to maritime activity.

[7] The City reads *Sisson* to preclude any reliance on what really happened, citing the Court's language that the actual effects on maritime commerce are irrelevant. City's Br. at 30. But when *Sisson* and *Foremost* are considered in context, the fallaciousness of the City's argument becomes apparent. Maritime commerce was not disturbed by the incidents in *Sisson* or *Foremost*. Hence, the Court was forced to engage in a counter-factual analysis: Were the general features of the incidents in those cases likely to disrupt commercial activity? Here we need not engage in any such inquiry, since we know to an absolute certainty that Great Lakes' activity, and the incident it engendered, had the potential to disrupt maritime commerce. Moreover, we are not convinced by the City's argument that pile installation is generally more likely to damage adjacent structures than to interfere with maritime commerce. It seems no more likely that a crane or pile driver or some other piece of equipment used to remove and install pilings would fall toward the shore than out across the river.

Having found that the incident giving rise to the damage of which the City and Grubart complains satisfies all of the prerequisites of admiralty jurisdiction identified in *Sisson*, we conclude that the district court erred in dismissing this case for lack of subject matter jurisdiction.[8] Great Lakes' complaint must still fall though if it fails to state a basis for recovery. Accordingly, we direct our attention now to the Limitation Act, the substantive law upon which Great Lakes anchors its claim.

The Limitation Act provides that the liability of a shipowner for any loss or damage "done, occasioned, or incurred without the privity or knowledge of such owner . . . shall not . . . exceed the . . . value of the interest of such owner in [the] vessel." 46 U.S.C. § 183(a). Great Lakes' complaint is proper as to form and will, therefore, survive a Rule 12(b)(6) motion unless Great Lakes is not entitled to relief "under any set of facts that could be proved consistent with the allegations." *Dawson v. General Motors Corp.*, 977 F.2d 369, 372 (7th Cir. 1992). The district court concluded that Great Lakes is clothed with "privity and knowledge" and thus is not entitled to the benefit of the Limitation Act. Consistent with this conclusion, the district court dismissed the complaint for failure to state a claim upon which relief could be granted.[9] Great Lakes does not dispute the district court's assertion that it bears the "ultimate burden of proving lack

[8] Because we conclude that 28 U.S.C. § 1333(1) adequately supports the district court's jurisdiction, we do not address Great Lakes' contention that the Limitation Act is an independent source of subject matter jurisdiction.

[9] We agree with the district court that both components of count I of Great Lakes' complaint, which seeks limitation of and exoneration from liability, rise or fall together, *see Wheeler v. Marine Navigation Sulphur Carriers, Inc.*, 764 F.2d 1008, 1011 (4th Cir. 1985) ("[O]nce limitation is denied, [claimants] should be permitted to elect whether to remain in the limitation proceeding or to revive their original claims in their original fora."), and that subject matter jurisdiction over counts II and III hinges upon the vitality of count I.

of privity or knowledge." Mem. Op. & Ord. at 27 (citing *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1305 (7th Cir. 1992)). Rather, Great Lakes argues that the district court impermissibly short-circuited the proceeding by dismissing its complaint on the pleadings.

The Limitation Act does not define the phrase "privity or knowledge," but its central meaning has been clear for at least fifty years. The Limitation Act is intended to shield from liability, beyond the amount of their interest in a vessel, "innocent shipowners and investors who were sued for damages caused through no fault or neglect of their own." *American Car & Foundry Co. v. Brassert*, 289 U.S. 261, 264 (1933). "Privity or knowledge," the absence of which is the touchstone of innocence according to the statute, is understood to be an owner's "personal participation . . . in the fault or negligence which caused or contributed to the loss or injury." *Coryell v. Phipps*, 317 U.S. 406, 411 (1943). What acts constitute "personal participation" is a troubling question in and of itself. *See Joyce v. Joyce*, 975 F.2d 379, 384 (7th Cir. 1992) (collecting cases). But when the shipowner seeking limitation of liability is a corporation, such as here, an equally puzzling antecedent question is raised: Whose participation is attributable to the corporation?

For purposes of determining a corporate shipowner's "privity or knowledge," we may divide its employees into two groups. One consists of corporate managers vested with discretionary authority. The other contains ministerial agents or employees. 3 Benedict on Admiralty § 42 at 5-14 (7th rev. ed. 1991). If a managerial employee is possessed of "privity or knowledge," i.e., if he or she personally participates in the activity that caused the alleged loss, the corporation is precluded from the benefit of the Limitation Act. *Id.* On the other hand, the privity or knowledge of purely ministerial employees is not attributable to the corporation. *Id.* Great Lakes is alleged to have negligently installed the pile clusters near the Kinzie Street Bridge. Such negligence presumably could be the result of any number of actions taken by any number of corporate

employees. For example, Great Lakes may have unreasonably failed to ascertain the existence of the freight tunnel beneath the river. Or, with full knowledge of the tunnel's existence, Great Lakes may have driven the pilings into the riverbed in a manner that unreasonably jeopardized the tunnel's integrity. The record is absolutely silent as to which corporate employees performed which tasks. We cannot determine, therefore, whether Great Lakes' negligence, if any, was, on the one hand, the product of unreasonable activity engaged in by one of its managerial employees or, on the other hand, the result of negligence or misconduct of one of its laborers at the job site. Because Great Lakes' ability to invoke the Limitation Act rests upon these precise determinations, the district court erred in dismissing the complaint.[10]

The district court relied upon our decision in *Joyce v. Joyce*, 975 F.2d 379 (7th Cir. 1992), in concluding that Great Lakes' ability to invoke the Limitation Act "will have no effect on [its] potential liability." Mem. Op. & Ord. at 28. In *Joyce*, the plaintiff charged that she was injured because a shipowner negligently entrusted his vessel to a person he knew, or should have known, was likely to use it in a manner involving an unreasonable risk of harm. The shipowner, an individual, sought to limit his liability pursuant to the Limitation Act. We concluded that the Limitation Act afforded the shipowner no protection because, if he did entrust the boat as alleged, he was not only negligent "but also had either knowledge or constructive knowledge sufficient to place him beyond the protection of the [Limitation Act]." *Id.* at 385. We further noted that if the owner did not negligently entrust his boat to someone he knew was unable to use it safely, he was not liable and thus had no need for the Limitation Act's pro-

[10] On remand, the district court, after adequate discovery, may have to decide whether certain activity was performed by "managerial" or "ministerial" employees. In this regard, we refer the district court to *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1303-04 (7th Cir. 1992).

tection. *Id.* Because the shipowner in *Joyce* was an individual, i.e., a natural person, our holding in that case is not appropriate to guide our decision here. The present case, which involves a corporate shipowner, lacks the same confluence of negligence and knowledge as existed in *Joyce*. Great Lakes is vicariously liable for the negligence of all of its employees. But it will be charged, for purposes of the Limitation Act, with the privity and knowledge only of certain managerial employees.

The district court also concluded that the "personal contracts doctrine" prevents Great Lakes from invoking the Limitation Act. Mem. Op. & Ord. at 30. This doctrine, except as we discuss below, may be inapplicable here and, in any event, is not a proper basis for dismissal on the pleadings. The liability Great Lakes seeks to limit arises primarily from claims sounding in tort, i.e., the claims of businesses, such as Grubart, that were in some way harmed when Chicago's downtown district was flooded. The "personal contracts doctrine," as its name suggests, provides only that the benefit of limited liability does not extend to certain *contractual* obligations. Specifically, contracts entered into by a shipowner "personally," rather than through the master employed for the ship, are beyond the reach of the Limitation Act. 3 Benedict on Admiralty, *supra*, at § 33. Only Great Lakes' contractual obligation "to indemnify the City . . . against all . . . loss" arising out of the installation of the piling clusters might fall into this category.[11] Mem. Op. & Ord. at 30-31. Contracts are "personal" to a corporate shipowner, however, only if they are executed by managerial employees acting within the scope of their discretion and authority. 3 Benedict on Admiralty, *supra*, at § 33. *See also* discussion *supra* at 12-13 & n.10. The present record is so undeveloped that we

[11] We assume, without deciding, that indemnity contracts are "personal" in the sense that a shipowner may not have the benefit of the Limitation Act against liabilities flowing out of them. *See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 644 (6th Cir. 1982).

cannot determine the status of the employee who signed the contract on Great Lakes' behalf. In no event, however, will the personal contracts doctrine affect Great Lakes' ability to obtain limitation of liability against anyone other than the City, and, even with respect to the City, the doctrine does not affect the potential limitation of tort liability.

For the foregoing reasons, the judgment of the district court is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 24, 1993

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable GARNETT T. EISELE, Senior District Judge*

No. 93-1421

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant

v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, Judge.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered this date.

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* The Honorable Garnett T. Eisele, Senior District Judge of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 7, 1993.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. GARNETT THOMAS EISELE, Senior District Judge*

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant,

No. 93-1421 v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee,

and

JEROME B. GRUBART, INC., an Illinois Corporation,
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, *Judge.*

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* Honorable Garnett Thomas Eisele, of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause and the response thereto, no active members** of the court requested a vote thereon and all of the judges on the original panel voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

On further consideration of the petition for rehearing, the court amends its opinion issued August 24, 1993 as follows:

Delete the penultimate paragraph of the opinion (pp. 14-15) and substitute the following:

The district court also concluded that the "personal contracts doctrine" prevents Great Lakes from invoking the Limitation Act. Mem. Op. & Ord. at 30. This doctrine, except as we discuss below, may be inapplicable here and, in any event, is not a proper basis for dismissal on the pleadings. The liability Great Lakes seeks to limit arises primarily from claims sounding in tort, i.e., the claims of businesses, such as Grubart, that were in some way harmed when Chicago's downtown district was flooded. The "personal contracts doctrine," as its name suggests, provides only that the benefit of limited liability does not extend to certain *contractual* obligations. Specifically contracts entered into by a shipowner "personally," rather than through the master employed for the

** Honorable Ilana Diamond Rovner, Circuit Judge, did not participate in consideration of this petition for rehearing en banc.

ship, are beyond the reach of the Limitation Act. 3 Benedict on Admiralty, *supra*, at § 33. The only contractual obligation of Great Lakes that has been cited to this court and that might fall into this category is its duty "to indemnify the City . . . against all . . . loss" arising out of the installation of the piling clusters. Mem. Op. & Ord. at 30-31. Contracts are "personal" to a corporate shipowner, however, only if they are executed by managerial employees acting within the scope of their discretion and authority. 3 Benedict on Admiralty *supra*, at § 33. *See also* discussion *supra* at 12-13 and n.10. The present record is so undeveloped that we cannot determine the status of the employee who signed the contract on Great Lakes' behalf. Nor is it clear whether the contract imposes liability on Great Lakes for injuries to third parties. These are all matters that can be addressed by the district court on remand. In no event, however, will the personal contracts doctrine affect the potential limitation of tort liability.

We assume, without deciding, that indemnity contracts are "personal" in the sense that a shipowner may not have the benefit of the Limitation Act against liabilities flowing out of them. *See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 644 (6th Cir. 1982).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 15, 1993

Before
Hon. RICHARD D. CUDAHY, *Circuit Judge*

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant,

No. 93-1421 v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee,

and

JEROME B. GRUBART, INCORPORATED,
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, Judge.

Upon the CLAIMANT'S MOTION FOR STAY OF MANDATE filed herein on 10/31/93, by counsel,

IT IS ORDERED that the CLAIMANT'S MOTION FOR STAY OF MANDATE is GRANTED and the mandate in this appeal is STAYED to and including 11/15/93.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 21, 1993

Before
Hon. RICHARD D. CUDAHY, Circuit Judge

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-Appellant,

No. 93-1421 v.

CITY OF CHICAGO, an Illinois municipal corporation,
Defendant-Appellee,

and

JEROME B. GRUBART, INCORPORATED,
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6754—Charles P. Kocoras, Judge.

This matter comes before the court for its consideration of the "GREAT LAKES' MOTION TO RECONSIDER THIS COURT'S ORDER STAYING THE MANDATE" filed herein on 10/18/93, by counsel for the plaintiff. On consideration thereof,

IT IS ORDERED that the GREAT LAKES' MOTION TO RECONSIDER THIS COURT'S ORDER STAYING THE MANDATE is DENIED.

[Dated February 18, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

92 C 6754

Complaint of GREAT LAKE DREDGE & DOCK COMPANY for Exoneration from or limitation of liability

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on defendant and claimant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons set forth below, the motion is granted.

BACKGROUND

On April 13, 1992, the Chicago River broke through a breach in an underground freight tunnel lying beneath the river. The river flowed through the tunnel and into the

downtown commercial district of the City of Chicago and into the basements of the buildings connected to the tunnel. This inundation of the tunnel caused significant damage and resulted in the mid-day evacuation of the downtown district and the declaration of a state and federal emergency. To aid emergency repair, the Captain of the Port of Chicago ordered the river closed between Grand Avenue on the North Branch, Cermak Road on the South Branch, and Lake Michigan on the Main Branch. The river remained closed for over a month. River traffic ceased, several commuter ferries were stranded, and many barges could not enter the river system even south of Cermak Road because the river level was lowered to aid repair efforts.

Numerous lawsuits against Great Lakes Dredge & Dock Company ("Great Lakes") and the City of Chicago (the "City") arose from this occurrence, including the class action lawsuit on behalf of tens of thousands of individuals and thousands of businesses ("claimants"), which has been filed in Illinois state court and consolidated under the caption *In re Chicago Flood Litigation*, No. 92 L 5422 ("Class Complaint"). Because resolution of the present motion to dismiss rests in some part on the central issues and allegations raised in the state court litigation, we will address them briefly below.

According to the Class Complaint, the damages sustained by plaintiffs and the Class were caused by the partial collapse of the tunnel at the Kinzie Street Bridge, specifically, in the immediate vicinity of the area where pilings had been installed by Great Lakes pursuant to a contract with the City earlier in the year. Claimants allege that both Great Lakes and the City knew or should have known of the existence and location of the tunnel at the Kinzie Street Bridge and that the pile removal and pile driving

work completed by Great Lakes for the City could result in damage to the tunnel. It is also alleged that Great Lakes installed new pilings in a location other than that originally designated in its contract with the City, failed to remove all the pilings contracted to be removed, and failed to take adequate safeguards against a breach of the tunnel. According to the Class Complaint, Great Lakes, in pounding and driving the pilings into the riverbed, caused one or more of the following conditions: an actual hole or breach of the tunnel wall; a weakening of the tunnel wall creating cracks or weakness in the structural integrity of the tunnel; a compacting of the earth around the tunnel walls creating excessive pressure on the tunnel; and such other events which proximately caused the tunnel wall to partially collapse or break. Moreover, the claimants bring a number of claims against the City, arising, *inter alia*, from the City's alleged failure to repair the damage to the breached tunnel when it became known to the City and from the City's alleged failure to warn plaintiffs and the Class about this dangerous condition.

On October 6, 1992, Great Lakes filed suit in this Court seeking exoneration from or limitation of any liability it may incur from claimants' suit against it. Great Lakes seeks to limit its liability to the value of two barges and a launch boat pursuant to 46 U.S.C. App. §§ 183(a) and 185, the relevant sections of the Limitation of Shipowner's Liability Act, Rev. Stat. § 4281 *et seq.*, 46 U.S.C. § 181 *et seq.* (1982 ed.) (Count I),[1] and indemnity (Count II) or

[1] The Act itself refers to the proceeding as a petition to limit liability. 46 U.S.C.App. § 185. Procedurally, however, limitation actions under the Act are governed by Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F. These rules refer to the pleading as a complaint for limitation of liability. Fed.R. Civ.P.Supp. Rule F(1). *Joyce v. Joyce*, 975 F.2d 379, 381 n. 2 (7th Cir. 1992).

contribution (Count III) from the City of Chicago in the event liability is found to exist in this case.

In response to Great Lakes' complaint in this Court, claimant Jerome B. Grubart, Inc. ("Grubart") and the City (collectively, "movants") filed their respective motions to dismiss pursuant to Rules 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Thereafter, an order was entered by this Court on October 8, 1992, which, in part, stayed and restrained the institution or further prosecution of any and all suits, actions, and proceedings against Great Lakes in any other court with respect to any claim or claims arising out of or occasioned by the Chicago tunnel disaster.

We find that this Court does not have subject matter jurisdiction over plaintiff Great Lakes' limitation action under the jurisdictional statutes establishing maritime jurisdiction. Moreover, we determine that Great Lakes' complaint seeking limitation of liability fails to state a claim upon which relief can be granted. Thus, we dismiss the present suit pursuant to both Rule 12(b)(1) and Rule 12(b)(6). In setting forth our present determination, we address the movants' 12(b)(1) motion and 12(b)(6) motion, respectively.

ANALYSIS

I. *MOTION TO DISMISS PURSUANT TO RULE 12(B)(1)*

Before discussing the merits of the movants' motions to dismiss, this Court must first recount the factual background to this dispute. While we recognize that many of the ensuing facts are the subject of contention by Great

Lakes and the movants,[2] we are guided in our review of these facts by the following legal standard.

1. *Legal Standard Governing Rule 12(b)(1) Motion*

The movants' 12(b)(1) motions attack the underlying facts asserted by Great Lakes in support of admiralty jurisdiction. Where a party properly raises a factual question concerning the court's jurisdiction, as through a Rule 12(b)(1) motion, the district court is not bound to accept as true the allegations of the complaint as to jurisdiction. *Gervasio v. United States*, 627 F. Supp. 428, 430 (N.D. Ill. 1986). Rather, the court may look beyond the jurisdictional allegations and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists. *Id.* The party asserting jurisdiction, here, Great Lakes, bears the burden of supporting its jurisdictional allegations with competent proof and therefore "must submit affidavits and other relevant evidence to resolve the factual dispute regarding the court's jurisdiction." *Kontos v. United States Department of Labor*,

[2] Great Lakes responded to the City and Grubart's jurisdictional challenge by submitting seven sworn affidavits and five documentary exhibits. It is against this evidence that Grubart directs his motion to strike, which is also presently before this Court. We find that, for the most part, Grubart's objections go to the weight, not the admissability, of Great Lakes' evidentiary materials. It is for the Court to determine the relevancy of these materials and the weight to be given to the factual matters asserted therein, which we have done accordingly. *See Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979). In reaching our present determination to grant Grubart and the City's motions to dismiss Great Lakes' limitation action, the Court has accorded proper weight to the affidavits and exhibits submitted by Great Lakes and, therefore, need not lend Grubart's motion to strike any further consideration.

826 F.2d 573, 576 (7th Cir. 1987); *Norman v. Levy*, 756 F. Supp. 1060, 1062 (N.D. Ill. 1990).

2. *Facts Pertaining to the Court's Jurisdictional Inquiry*

In December, 1990, the City invited marine firms including Great Lakes to bid on a project to replace fourteen pile clusters, also known as timber dolphins, at five separate bridge sites in the Chicago River. Great Lakes won the contract. One of the sites included in the project was located at the south side of the Kinzie Street Bridge. During the last week of August and the first three weeks of September, 1991, Great Lakes' barge crew removed old, deteriorating pile clusters and drove new pilings into the riverbed at the Kinzie Street site. Over six months after Great Lakes completed its work under the contract, on April 13, 1992, the Chicago River broke through the tunnel system running beneath the river and flooded Chicago's business district.

Pursuant to the City and Great Lakes' contract, Great Lakes alleges that in July and August, 1991, it employed three vessels to various sites along the North and South Branches of the Chicago River, ultimately to a point alongside the Kinzie Street Bridge. The three Great Lakes' vessels involved in removing and replacing the Kinzie Street pile clusters consisted of two barges and one launch or tug, called the M/V PEACH STATE. Both barges are allegedly "load line certified" by the American Bureau of Shipping, meaning they are registered to navigate in open, unprotected waters and meet seaworthiness criteria. One barge, G.L. 150, is said to weigh 350 tons and have a length of 131.1 feet and breadth of 34 feet. The other barge, the G.L. 136, weighing 426 tons, with a length of 121 feet and breadth of 44 feet, was called in Great Lakes'

Foreman's Daily Reports either "Spud Scow 136" or "Barge 136," a title, according to Grubart, that depended upon the nature of the work being performed.[3] G.L. 136 was fixed at the Kinzie Street site during the pile-driving job, and it is from this barge that the pilings were driven.

Both barges were used occasionally to transport the Great Lakes crew from one work site to the next. Barge G.L. 136 transported a crane and related equipment to and from each work site and the Great Lakes' facilities on the Calumet River. The other barge, G.L. 150, primarily served to transport the new pilings from Great Lakes' facilities on the Calumet River to the work sites and to stow the old pilings until the work was completed. With regard to the launch, the M/V PEACH STATE regularly towed the barges whenever the work required repositioning, and every morning and night towed at least one of the barges to and from the night berth and work site. Moreover, pursuant to its contractual duty stated below, the M/V PEACH STATE towed the barges out of the navigable channel whenever another vessel sought passage.

Great Lakes alleges that only marine firms can perform the pile driving work requested by the City because this work must be performed from vessels in the navigable

[3] On the sole basis of selective Great Lakes' Foreman Daily Reports, which do not state the tasks to be performed that day, Grubart argues that Great Lakes treated G.L. 136 differently, depending on its use at the time. According to Grubart's unsubstantiated reading of the reports, during the pile-driving activity, Great Lakes considered G.L. 136 to be a spud scow, which is designed as a work platform that is affixed in position by dropping its spuds in the river bed or by lifting itself out of the water for stability. On the other hand, according to Grubart, upon the completion of the pile driving work, when G.L. 136 was being transported back to Great Lakes' yard, Great Lakes considered G.L. 136 to be a barge.

channel and such vessels have to be moved from time to time to permit other maritime traffic to pass. In support of its position, Great Lakes cites Provision 209 of the contract, which specifically required Great Lakes to comply with U.S. Coast Guard regulations protecting the right of other vessels to navigate past the work sites:

> The Contractor's attention is directed to the fact that the Branches of the Chicago River involved are navigable streams. As such, the bridges involved herein must be open to masted vessels at any time on signal . . . . During the execution of the contract, marine regulations shall be complied with in every way, so that river traffic may be protected and any river obstruction avoided . . . .

Moreover, the contract's construction methods indicate that the pile removal and driving work would involve work below the waterline of the Chicago River and required the contractor to supply all labor and equipment necessary to perform the pile driving work, including, *inter alia*, barges and tugs.

Although there is some dispute between the parties as to the intended purpose of the pile clusters at the Kinzie Street location, it is clear that they were principally intended for the protection of the bridge at that site. The City argues that this was their sole purpose and, in the state court litigation, Great Lakes repeatedly stated that the pilings were intended to protect the bridge. In the instant litigation, Great Lakes has taken the position that the pile clusters were designed for several purposes, including the protection of vessels and use as navigational aids.

In addition to the fact that the City and Great Lakes have, on prior occasions, repeatedly stated that the purpose for the dolphins was to protect the bridge and bridgehouse, the June 7, 1990 City ordinance authorizing

the dolphin replacement project read, in part, "[t]hat said Project generally consist of the replacement of pile clusters at various bridges within the City, in order to provide the structures with increased protection from the possibility of collision by marine traffic." Great Lakes' complaint asserts that the pilings are located "next to," and therefore outside, the navigable channel. (G.L. Complaint ¶ 4). Thus, even according to Great Lakes' complaint, pilings are not entirely surrounded by navigable water. Implicit in Great Lakes' complaint is the acknowledgement that the pilings are not "solely" or "principally" in aid of navigation.

3. *Discussion*

Both movants contend that Great Lakes' complaint should be dismissed under Rule 12(b)(1), because 28 U.S.C. § 1333(1) and 46 App. U.S.C. § 740, the jurisdictional statutes relied upon by Great Lakes to establish maritime jurisdiction, do not support subject matter jurisdiction in this case. As stated previously, once the existence of subject matter jurisdiction is challenged in a motion to dismiss under Fed.R.Civ.P. 12(b)(1), the burden of establishing such jurisdiction through relevant, competent evidence shifts to the party asserting the same. *Norman*, 756 F. Supp. at 1062; *Gervasio*, 627 F. Supp. at 430. For the reasons set forth below, we find that Great Lakes has not met its burden of establishing this Court's subject matter jurisdiction, and, accordingly, we grant movants' 12(b)(1) motion to dismiss.

A. *The Court Lacks Jurisdiction Under 28 U.S.C. § 1333(1)*

Courts have held that federal admiralty jurisdiction exists in a particular case only if the protection of maritime activity through adherence to a uniform and specialized set of rules governing that activity on navigable waterways is essential. A trilogy of Supreme court cases confines the exercise of admiralty jurisdiction under 28 U.S.C. § 1333(1) to actions satisfying the following two prerequisites:

1. the alleged wrong must occur on navigable waters (situs test); and
2. the alleged wrong must bear a significant relationship to "traditional maritime activities" (nexus test).

Sisson v. Ruby, 497 U.S. 358, 110 S. Ct. 2892, 2895-98 (1990); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674 (1982); *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 266 (1972).

Prior to 1972, the determination of whether a tort was maritime depended solely upon the situs of the wrong. In 1972, the Supreme court in *Executive Jet*, a case which arose out of an aircraft accident over navigable water, rejected this strict situs test stating:

> [i]t is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

Executive Jet, 409 U.S. at 268. Although the Court's holding in *Executive Jet* was limited by its terms to cases involving aviation torts, the Supreme Court applied *Executive Jet* to determinations of federal admiralty jurisdiction outside the context of aviation torts in *Foremost. Sisson*, 110 S.Ct. at 2895 (*citing Foremost*, 457 U.S. at 673).

With regard to the "nexus" test, the Supreme Court held in *Foremost* that all tort actions invoking admiralty

jurisdiction must meet *Executive Jet*'s new nexus test, requiring a significant relationship with "traditional maritime activity." *In re Complaint of Sisson*, 867 F.2d 341, 343 (7th Cir. 1989), *rev'd on other grounds*, 110 S.Ct. 2892 (1990) (*citing Foremost*, 457 U.S. at 673-74). When defining traditional maritime activity, the Court recognized that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," and stated the federal interest in protecting maritime commerce "can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct." *Id.* (citing *Foremost*, 457 U.S. at 674-75). The *Foremost* Court, in holding that the collision between two pleasure boats fell within the federal courts' admiralty jurisdiction, ruled:

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Foremost, 457 U.S. at 675.

In *Sisson v. Ruby*, a case involving a fire on a noncommercial vessel docked at a recreational marina on Lake Michigan, the Supreme Court further clarified the nexus component of the jurisdictional inquiry under § 1333. The *Sisson* Court reiterated the admiralty jurisdiction principles it had stated in a footnote within the *Foremost* opinion, "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction, but that when a potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity . . . admiralty jurisdiction is appropriate." *Sisson*, 110 S.Ct. at

2895-96 (*citing Foremost*, 457 U.S. at 675 n. 5). In view of this statement, the *Sisson* Court discerned a "two-part *Foremost* test," which requires the party seeking to invoke maritime jurisdiction to show that there existed (1) an incident having a potentially disruptive impact on maritime commerce, and (2) a substantial relationship between the activity giving rise to this incident and traditional maritime activity. *Id.* at 2896-97.

Great Lakes alleges in its complaint that the Admiralty Extension Act, 46 U.S.C. App. § 740 also supplies a jurisdictional base for its complaint. That statute provides in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water notwithstanding that such damage or injury be done or consummated on land.

It has been held that the Admiralty Extension Act was intended to eliminate the inequities and anomalies resulting from the strict application of the situs rule in admiralty under then existing law. The Act was not intended to grant claimants new substantive rights of recovery nor relieve them from jurisdictional constraints unrelated to locality imposed on general maritime tort claimants. Claims under the Admiralty Extension Act are to be subject to the "maritime relationship" rule of *Executive Jet*. *Sohyde Drill & Marine v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1136 (5th Cir. 1981); *see also Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767, 768 (11th Cir. 1984); *Dean v. Maritime Overseas Corp.*, 770 F. Supp. 309, 312 (E.D. La. 1991); *Felix v. Arizona Dep't of Health Services, Goods, Vital Records Section*, 606 F. Supp. 634, 636 (D. Ariz. 1985); *Jorsch v. Le Beau*, 449 F. Supp. 485, 488-89 (N.D. Ill. 1978).

The test to determine the presence or absence of a significant relationship to traditional maritime activities in a particular case has been described in varying formulations. Judge Aspen of this Court has said that "the preferred course . . . is to evaluate the entire scope of events involving both the defendant's behavior and the manner in which the plaintiff is injured in evaluating whether there is a connection with traditional maritime activity significant enough to establish admiralty jurisdiction." *American Nat. Bank & Trust Co. of Waukegan v. United States*, 636 F. Supp. 147, 149 (N.D. Ill. 1986). This test may be described as the totality of circumstances test. The Fifth Circuit, in the case of *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1974), has outlined four factors which may be considered in determining the existence of a substantial maritime relationship:

1. the functions and roles of the parties;
2. the types of vehicles and instrumentalities involved;
3. the causation and type of injury; and
4. traditional concepts of the role of admiralty law.

Sohyde, 644 F.2d at 1136.

In *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987), the four criteria set forth in *Kelly* were addressed in light of the Supreme Court's decision in *Executive Jet* and *Foremost*. The indicia of maritime flavor described in the latter two cases was described as (1) the impact of the event on maritime shipping and commerce, (2) the desirability of a uniform national rule to apply to such matters, and (3) the need for admiralty "expertise" in the trial and decision of the case. The Fifth Circuit then held that the analysis of *Kelly* should be applied with the indicia divined from *Executive Jet* and *Foremost*.

However the test is stated, the logical starting point in the analysis is the nature and quality of the wrong or wrongs alleged in the case. Although the Class Complaint alleges a litany of tortious conduct on the part of Great Lakes, at bottom it rests on the proposition that Great Lakes' pile-driving activity was negligently performed, causing a breach in the tunnel wall and the resulting flood of the tunnel and portions of the Chicago business district. The charges against the City also involve alleged failure to prevent or cure Great Lakes' breach of the tunnel wall, thereby failing to prevent the flooding of the tunnel and the class properties.

It is significant to note that the alleged wrongs did not involve the movement or collision of a vessel. Nor did the alleged wrongs involve the transport of cargo or people on a navigable waterway. Nor can it be said that the tunnel or the walls were somehow part of the Chicago river or any other navigable waterway. Indeed, the tunnel and its environs were part of the land and the significant injuries that were suffered were the result of the *proximity* of the tunnel to the river—an unfortunate but fortuitous geographical configuration.

Additionally, the pile-driving activity and the placement of the new dolphins were undertaken primarily to protect the Kinzie Street bridge and its machinery, long ago held to be part of the land and not part of the river waterway. In *Cleveland Terminal & Valley R. R. Co. v. Cleveland S. S. Co.*, 208 U.S. 316 (1908), plaintiff sued in admiralty for damage sustained to a center pier of a drawbridge and its protective pilings when a steamer collided with the pier. The Supreme Court ruled that the situs requirement had not been established because "the bridges, shore docks, protection piling, piers, etc, pertain to the

land" and thus were not within the court's admiralty jurisdiction. Although the Admiralty Extension Act has eliminated the situs requirement, it did nothing to alter the holding of *Cleveland Terminal* that protective pilings for bridges pertained to the land, and in evaluating the totality of circumstances here, it maintains that character.

The parties are at odds over whether the activity of pile driving is, itself, a traditional maritime activity. The City argues that pile driving is an activity common to the construction industry, regardless of the project's location, and is not unique to rivers or bodies of water. Standing alone, the City's assertion is a truism. Great Lakes' principal argument on this point is that pile clusters, or dolphins, are vital to maritime commerce and their use as navigational aids is not subject to dispute. Both sides cite cases in support of their respective arguments. Frankly, the cited cases are not dispositive in categorizing pile driving activity, and other factors present color the decisions in the cited cases. As we previously held, however, the main purpose of these dolphins was the protection of the bridge and its operating mechanisms. It is that function which predominates in the overall analysis of whether we are dealing here with a traditional maritime activity.

Both sides have expended considerable energy in debating whether the two barges and the launch are "vessels" within the meaning of section 740. The decided cases support both positions and are, in reality, irreconcilable. In *Ellender v. Kiva Constr. & Eng'g Inc.*, 909 F.2d 803, 806 (5th Cir. 1990), the Fifth Circuit ruled that a spud barge used for pile driving was not a vessel under the Jones Act because the "barge was not designed or used to transport passengers, cargo, or equipment from place to place across navigable waters, where the barge required

tug boats or other vessels to move it, and where the barge remained virtually stationary during any particular project." Although the barge at issue there, like Great Lakes' barges here, supported a mobile crane and other equipment, the court held that "these transportation functions [were] incidental[ ] to its other uses," and thus insufficient to confer "vessel" status on the barge. *Id.* at 807; *see also Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 832 (5th Cir. 1984) ("a structure whose primary function is to serve as a work platform does not become a vessel [under Jones Act] even if it sometimes moves significant distances across navigable waters in the normal course of operations"); *accord, Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973).

The Seventh Circuit has also spoken on the issue, however, and we are bound by its view. In *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), the definition of "vessel" for Jones Act purposes was set forth:

> The "vessel in navigation" requirement pertains not to the vessel's mobility at the precise moment of injury, but to whether it has at times been employed as a means of transport on water for passengers or cargo and has not been withdrawn from navigable waters and laid up, say, for the season . . . . Any floating structure, including those designed for special purposes, is a "vessel" capable of having a maritime "crew" so long as the structure at some time serves as a means of transport on water. "To be a vessel, the purpose and business must to some reasonable degree be the 'transportation of passengers, cargo, or equipment from place to place across navigable waters.' " (citations omitted).

Id. at 1063.[4] Mindful of the transport functions performed by each, we determine that the two barges and the launch utilized by Great Lakes to perform the pile removal and driving activity required under the contract were vessels for admiralty purposes.

Having resolved the question of whether the barges and launch were vessels, we next address whether the injuries at issue were "caused by a vessel on navigable water," the Section 740 requirement, or whether the alleged wrong bears a significant relationship to traditional maritime activities. In analyzing both issues it is apparent that the particular *function* of the vessels involved is far more important than their classification as vessels. Only in this way can we harmonize *Johnson* with the cases, cited above, which differ in result. It bears repeating that the Supreme Court has held that the requisite substantial relationship between the activity giving rise to the incident and traditional maritime activity is not always present whenever navigable water or a vessel is involved.

In determining the jurisdictional issue, it is as important to examine what the case does not involve as it is to examine what it does. The following summary addresses both concepts:

1. None of the vessels were directly involved in the cause of the injury to the tunnel wall and did not strike anything to cause the harm in question.

[4] *Johnson* involved an ironworker who sued a barge owner under the Jones Act, 46 U.S.C. § 688, for injuries sustained while working on a construction barge, which, like the G.L. 136 present in this case, had no motive power of its own and no steering capability and whose primary role was to provide a construction site and assist in the construction of the designated project.

2. The vessels were acting as fixed platforms and were not involved in navigation on a waterway during the pile driving activities.
3. The injuries were not sustained on a dock or pier next to the site of the work activity, but were experienced on land, blocks away in Chicago's business district.
4. Pile driving is a common construction activity and is found in both maritime and non-maritime settings. The principal purpose of the placement of the dolphins at the Kinzie Street site was the protection of the bridge, which the Supreme Court views as an extension of the land.
5. The pile driving activity did not present a foreseeable or material disruption of maritime commerce on the Chicago River. The actual effect on commerce took place many months after the alleged wrongful acts and were part of the massive remediation efforts engaged in by the City and others.
6. There are no allegations of personal injury on a vessel on navigable waters, nor for damage done to a vessel in navigation or its cargo.

In summary, the relevant facts alleged to be present in this now historic calamity to our city do not involve traditional maritime concerns. Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules. Traditional common law rules of tort and contract should do quite nicely in the resolution of the material disputes here; the specialization of admiralty rules is not necessary. The totality of circumstances lead unyieldingly to that conclusion. Simply put, we have land-based injuries caused by land-

based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and supply none of the causation for the alleged injuries. There are no traditional maritime concerns present here and, without it, no admiralty jurisdiction.

The case of *National Union Fire Ins. Co. of Pitts, Pa. v. U.S.*, 436 F. Supp. 1078 (M.D. Tenn. 1977), is instructive. That case involved water damage to some stock stored in a warehouse as a result of flooding by the Cumberland River. The United States was accused of negligent operation of certain dams on the Cumberland. The court stated:

> [T]he activity [at issue should be appraised] in terms of its actual effects as well as its general nature. Thus, while control of the water level does generally involve considerations affecting navigation and commerce upon the water, the only actual impact of concern in this instance is the flooding of a shore-based warehouse. Viewed in this way, it becomes more difficult to perceive an actual maritime incident for which the unique principles and procedures of admiralty are pertinent. Had the rising water caused boats to break from their moorings and sustain damage, or inundated a barge and destroyed its cargo, this court would have little difficulty in finding admiralty jurisdiction. However, where the actual untoward consequence is of a kind which can readily be dealt with by resort to established common law tort principles, it makes no sense to dredge up (no pun intended) a whole body of law whose purpose and history is inextricably bound up in matters concerning maritime commerce. It should not be overlooked that the navigability of the Cumberland River, which is a *sine qua non* of admiralty jurisdiction, had nothing whatever to do with the injuries sustained in this case. It is not inconceivable that a stopped

> up storm drain, during an abnormally heavy rainfall, could have resulted in essentially the same damage to the material in the warehouse. And in such a case, a suit against the municipality (assuming no immunity) alleging negligent failure to keep the sewers cleared of debris, could easily be disposed of within the contours of state tort law. The fact that the alleged culprit in the instant case was the Corps of Engineers and that the destructive force happened to be a navigable stream does not alter the availability, viability, and indeed, the preferability of state law for disposing of this case.

Id. at 1083.

Finding similar prior cases to assist in guiding judicial decision is not an exact science. Conjuring up the unique set of facts giving rise to the great Chicago Flood might best be the product of fiction writers—after all, how many major cities come equipped with miles of subterranean tunnels whose existence is unknown to most of its inhabitants? But even though the facts of *National Union* may be dissimilar to the quite unique facts of the instant case, its reasoning does apply.

As in *National Union*, the mere fact that the injuries were allegedly caused by water from a navigable river is insufficient to establish admiralty jurisdiction. Nor does this case involve issues such as navigation or the sea worthiness of vessels that admiralty law was designed to address. Consequently, there is no basis for federal admiralty jurisdiction.

B. *The Limitation Of Shipowner's Liability Act Does Not Provide A Separate Basis Of Admiralty Jurisdiction*

The Supreme Court in *Sisson* declined to resolve the parties' contentions regarding whether the Limitation of

Shipowner's Liability Act, 46 U.S.C. § 181 *et seq.*, provides an independent basis for federal jurisdiction. 110 S.Ct. at 2894 n. 1. Nonetheless, the Seventh Circuit definitively ruled in *In re Complaint of Sisson*, 867 F.2d at 349-50, in a portion of the opinion not reversed by the Supreme Court, that the Limitation of Liability Act does not independently confer admiralty jurisdiction. The Seventh Circuit stated:

> In our view, when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing the Limitation of Liability Act—which provides for a practice apparently defensible only in a traditional maritime context—to provide an independent basis for admiralty jurisdiction . . . . We believe that allowing admiralty jurisdiction here would be contrary to the policy of *Executive Jet* and *Foremost*. In creating the nexus requirement, the Supreme Court confined the reach of admiralty jurisdiction to include only those tort actions with which a uniform, sea-going jurisprudence should be concerned. To permit an alleged tortfeasor to circumvent the requirement that the tort bear a connection to traditional maritime activity simply by asserting a right to limit liability would eviscerate the nexus test.

Id. Accordingly, in keeping with the Seventh Circuit's clear dictate and our prior discussion, we hold that the Limited Liability Act does not provide this Court with an independent basis for federal jurisdiction.

In sum, Great Lakes has failed to meet its burden of establishing this Court's subject matter jurisdiction over its limitation of liability action, and, therefore, Great Lakes' suit is dismissed pursuant to Rule 12(b)(1).

II. *MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)*

Even if we were to have found that this Court has subject matter jurisdiction over the present suit, we determine that Great Lake's complaint fails to state a claim upon which relief can be granted. Great Lakes seeks exoneration from or limitation of its liability for the accident pursuant to the Limitation of Shipowner's Liability Act, 46 U.S.C. § 181 *et seq.* (the "Act"). The Act limits the liability of a shipowner for any loss incurred without the knowledge or privity of the owner to the value of the vessel and its freight. 46 U.S.C. § 183(a). A shipowner may petition a district court of proper jurisdiction for exoneration from or limitation of liability. 46 U.S.C. § 185. Upon the shipowner's filing of the petition and his tender of an adequate bond, the district court must enjoin all other proceedings against the shipowner involving issues arising out of the subject matter of the limitation action. *Id. See also Ex Parte Green*, 286 U.S. 437, 438-40 (1932); *S & E Shipping Corp. v. Chesapeake & O. R. Co.*, 678 F.2d 636, 642 (6th Cir. 1982). The district court must ultimately decide whether the shipowner has a right to limitation of liability; the claimants may pursue their common law remedies in another forum only if they concede that the district court has exclusive jurisdiction over the question of whether liability is limited. *See S & E Shipping Corp.*, 678 F.2d at 643 n. 13; *Helena Marine Service, Inc. v. Sioux City*, 564 F.2d 15, 18 (8th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

Both movants assert that Great Lakes' complaint should be dismissed on the basis that Great Lakes is foreclosed as a matter of law from obtaining limitation of liability under the Act. The movants base this contention on their allegation that Great Lakes was in privity to and with

knowledge of the alleged negligence. The City additionally seeks summary dismissal of Great Lakes' complaint on the ground that Great Lakes is not entitled to limitation based on the "personal contract doctrine." Great Lakes refutes both arguments, arguing that it has stated a *prima facie* case for limitation under the Act and its claim for exoneration is compelling in light of the City's failure to advise Great Lakes about the existence of the tunnel. Before addressing the parties' contentions, we first discuss the appropriate legal standard by which to judge a motion to dismiss pursuant to Rule 12(b)(6).

1. *Legal Standard Governing 12(b)(6) Motion*

To withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Conley v. Gibson*, 355 U.S. 41 (1957). The defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987). The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. *See also Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986). The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to

decide the merits of the case. We address the City and Grubart's motion with these principles in mind.

2. *Discussion*

A. *Great Lakes' Claim For Limitation Of Liability Under Count I Should Be Dismissed*

i] *"Privity or Knowledge" Basis For Dismissal Of Limitation Claim*

The Limitation of Shipowner's Liability Act allows district courts, under their admiralty jurisdiction conferred by 28 U.S.C. § 1331, to determine whether a shipowner's liability should be limited when that liability may be predicated on an act that was not within the shipowner's "privity or knowledge." *Joyce v. Joyce*, 975 F.2d 379, 383 (7th Cir. 1992). Section 183(a) provides:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, *without the privity or knowledge of such owner or owners*, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(emphasis added).

In limitations proceedings, the ultimate burden of proving lack of privity or knowledge is on the shipowner. *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1305 (7th Cir. 1992). In discerning the meaning of the Act's phrase "privity or knowledge," the Seventh Circuit in *Joyce* found, "Congress intended the principal beneficiaries of

the Act to be innocent shipowners and investors who were sued for damage caused through no fault of their own." *Joyce*, 975 F.2d at 384. The Seventh Circuit observed recently in *In re Oil Spill by the Amoco Cadiz*, 954 F.2d at 1303, "The recent judicial trend has been to enlarge the scope of activities within the 'privity or knowledge' of the shipowner . . . ." *Id.*

In opposing the present motion to dismiss, Great Lakes does not confront the recent Seventh Circuit rulings addressing the "knowledge and privity" inquiry relied upon by movants but, rather, cites the Eleventh Circuit case, *M/V Sunshine, II v. Beavin*, 808 F.2d 762 (11th Cir. 1987), for the proposition that summary dismissal of a limitation action before the completion of discovery is inappropriate. This argument, however, ignores the recent Seventh Circuit ruling in *Joyce*, where the court affirmed a district court's *sua sponte* dismissal of a limitation complaint for lack of subject matter jurisdiction. 975 F.2d at 385-86. Moreover, this Court finds that the principles recently articulated by the Seventh Circuit in its *Joyce* and *Amoco Cadiz* rulings counsel dismissal of Count I of Great Lakes' complaint under Rule 12(b)(6).

In *Joyce v. Joyce*, a vessel owner, who had been sued in state court for negligent entrustment of his boat to another filed a limitation action in federal court under the Act. The district court *sua sponte* dismissed the vessel owner's complaint for lack of subject matter jurisdiction and the Seventh Circuit affirmed. After exploring the meaning of the phrase "privity or knowledge" under the Act and the law of negligent entrustment, the Seventh Circuit reasoned:

> Given the nature of the tort of negligent entrustment, it is clear that the Limitation of Shipowner's Liability Act affords no protection to William. If William knew or had reason to know that Ivkovich should not have been entrusted with the boat, he not only committed the tort of negligent entrustment but also had either knowledge or constructive knowledge sufficient to place him beyond the protection of the Limitation of Liability Act. On the other hand, if William did not entrust the boat to Ivkovich under circumstances in which he knew or should have known of Ivkovich's inability, he will incur no liability for negligent entrustment and, consequently, has no need of the Act's protection. In either case, the district court could not do anything to affect either party and was correct to dismiss the suit for lack of subject matter jurisdiction. Prompt, *sua sponte* recognition of flaws in subject matter jurisdiction is commendable.

975 F.2d at 385-86.

Regardless of the different allegations of negligence in the present case, we find that the *Joyce* rationale is determinative of the present 12(b)(6) motion. As in *Joyce*, the extension of admiralty jurisdiction in the present case will have no effect on Great Lakes' potential liability. Underlying the claimants' negligence claims against Great Lakes in the consolidated Class Complaint is the allegation that Great Lakes knew or should have known of the existence and location of the tunnel at the Kinzie Street Bridge and that the work required under the contract could result in damage to the tunnel.[5] Following *Joyce*'s reasoning, if Great Lakes is found not negligent, Great Lakes will have no need for the Act's protection. On the other hand, if

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[5] For example, the class action claimants allege that the contract between Great Lakes and the City advised Great Lakes in part that moving the pilings in any fashion could result in damage to underground structures. The Court's reading of the relevant portion of the contract confirms the existence of this notification. *See* Contract at DS-5.

Great Lakes is found, for example, to have had constructive knowledge of the tunnel system or to have driven the piles into the riverbed in a negligent manner (e.g. at the wrong point along the riverbed), the Act affords Great Lakes no protection because such a finding would establish that Great Lakes had either knowledge or constructive knowledge sufficient to place it beyond the protection of the Act. Accordingly, a finding of negligence liability against Great Lakes will be tantamount to a finding of Great Lakes' privity or knowledge, thereby precluding Great Lakes from seeking limitation pursuant to the Act under *Joyce*.[6]

Thus, the present case, while involving different allegations of negligence, nonetheless, constitutes the identical situation confronted by the Seventh Circuit in *Joyce*: a finding of negligence will be tantamount to a finding of privity or knowledge and a finding of nonliability will moot

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[6] The Seventh Circuit's *Amoco Cadiz* decision lends support to our present determination in that it articulates a low threshold for establishing privity or knowledge sufficient to deny petitioners protection under the Act. In *Amoco Cadiz*, the Seventh Circuit rejected the petitioning shipowner's contention that a vessel owner's actual or constructive knowledge of the causal negligence must be shown to establish "privity or knowledge." In refuting this argument, the Seventh Circuit stated:

> Not so. Privity or knowledge is not tantamount to actual knowledge or direct causation. All that is needed to deny limitation is that the shipowner, "by prior action or inaction set[s] into motion a chain of circumstances which may be a contributing cause even though not the immediate or proximate cause of a casualty . . ." *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1158 (2nd Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

Amoco Cadiz, 954 F.2d at 1303. In view of this low threshold, a finding of Great Lakes' negligence would satisfy this standard without question.

the limitation claim. Mindful of the Seventh Circuit's determination that the petitioner's claim for limitation could not be realized in this very situation, we dismiss Great Lakes' limitation claim under Count I for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6).

ii] *"Personal Contract Doctrine" Basis For Dismissal Of Great Lakes' Limitation Claim*

This Court finds that another independent basis exists for the dismissal of Great Lakes' suit under Rule 12(b)(6), namely, Great Lakes is not entitled to limitation based on the "personal contract doctrine." Great Lakes' pile driving work was performed pursuant to a written contract with the City under which Great Lakes undertook numerous duties and warranties and agreed to indemnify the City against any loss arising from the contract work. *See, e.g.*, contract at G-1 ("Contractor shall indemnify, keep and save harmless the City, its agents, officials, and employees, against all injuries, deaths, loss, damages, claims, patent claims, suits, liabilities, judgments, costs and expenses, which may in anywise accrue against the City in consequence of the granting of this contract or which may in anywise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence or omission of the Contractor . . . .").

Under clear precedent, the Act has been held not to apply where the liability of the owner rests on his personal contract. *Coryell*, 317 U.S. 406, 409 (1943) (*citing Pendleton v. Brenner Line*, 246 U.S. 353 (1917)); *Richardson v. Harmon*, 222 U.S. 96, 106 (1911) (the Limitation Act "limit[s] the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the

master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts"); *S & E Shipping Corp.*, 678 F.2d at 644. The Supreme Court established the personal contract exception because the Act is only intended to limit the shipowner's liability for matters beyond his control, and a personal contract is within the control of the shipowner. *S & E Shipping Corp.*, 678 F.2d at 644 n. 14. On this basis, we find that Great Lakes' liability stemming from its personal contract with the City is not subject to limitation under the Act.

The Supreme Court and lower courts have clearly indicated that the primary purpose of an exoneration or limitation of liability action by vessel owners in federal admiralty court is to ensure the fair distribution of a limitation fund among all claimants. *See Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151 (1957); *In re Complaint of Falkiner*, 716 F. Supp. 895, 901 (E.D. Va. 1988). The purpose of the *concursus*, the proceeding before the admiralty court in which all competing claims must be litigated, is to provide for a marshalling of assets and for a *pro rata* distribution of an inadequate fund among claimants. *S & E Shipping Corp.*, 678 F.2d at 642. *See also Lake Tankers Corp.*, 354 U.S. at 151-53.

Here, in light of our present determination under the personal contract doctrine, *concursus* is no longer required, because the only remaining claims against Great Lakes still subject to the Act are those raised by the class action claimants. *See S & E Shipping Corp.*, 678 F.2d at 643 (the district court must dissolve a stay of proceedings and permit claimants to litigate their claims in the state forum if only one claim against the shipowner is made; "[i]n this situation a *concursus* is unnecessary because there are no additional claimants competing for portions

of the limitation fund"). If *concursus* of a limitation fund is not necessary, we are instructed to permit claimants to litigate their claim in the state forum. *In re Complaint of Falkiner*, 716 F. Supp. at 901. *See also Lake Tankers Corp.*, 354 U.S. at 151; *S & E Shipping Corp.*, 678 F.2d at 642-45. Thus, this constitutes yet another basis for our dismissal of Great Lakes' limitation claim.

B. *Great Lakes' Claim For Exoneration Under Count I Should Be Dismissed*

Where, as here, an alleged vessel owner is foreclosed from obtaining limitation of liability, the vessel owner is also foreclosed from proceeding in federal court with the exoneration component of its claim against the wishes of the claimants. *Lake Tankers Corp.*, 354 U.S. 147; *Wheeler v. Marine Navigation Sulphur Carriers, Inc.*, 764 F.2d 1008, 1011 (4th Cir. 1985) (ruling "[e]ach circuit that has considered this question has ruled that once limitation is denied, plaintiffs should be permitted to elect whether to remain in the limitation proceeding or to revive their original claims in their original fora"); *Fecht v. Makowski*, 406 F.2d 721, 722-23 (5th Cir. 1969) ("where no grant of limitation is possible, the damage claimants are entitled to have the injunction against other actions dissolved, so that they may, if they wish, proceed in a common law forum as they are entitled to do"); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 595-96 (2nd Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); *In re Complaint of Falkiner*, 716 F. Supp. at 901. Under the foregoing authorities and in consideration of the claimants' desire to prosecute their class action in state court, we find it appropriate to dismiss Count I of Great Lakes' complaint in its entirety, including the claim for exoneration.

C. *Counts II and III Should Be Stricken*

Because Count I of Great Lakes' complaint for exoneration or limitation is properly dismissed, Counts II and III, which seek indemnity and contribution from the City by way of impleader under Federal Rule of Civil Procedure 14(a) and (c), should be stricken as well for lack of subject matter jurisdiction. The relief requested in both of these counts is contingent upon a finding of liability under Count I; however, upon Count I's dismissal, the indispensable predicate for the adjudication of Counts II and III is no longer present. Given the central purpose of Rule 14, which is to promote judicial economy and efficiency, *Colton v. Swain*, 527 F.2d 296, 299-300 (7th Cir. 1975), we discern no justification for retaining jurisdiction of Counts II and III, and we strike them accordingly.

CONCLUSION

For the foregoing reasons, we dismiss Great Lakes' complaint both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

/s/ Charles P. Kocoras
Charles P. Korcoras
United States District Judge

Dated: February 18, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Great Lakes Dredge & Dock Company

v. Case Number: 92 C 6754

City of Chicago

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Great Lakes' complaint is hereby dismissed.

Final judgment is entered.

February 18, 1993
Date

H. STUART CUNNINGHAM
Clerk

/s/
(By) Deputy Clerk

93-767
No. 93-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,
Petitioner,

v.

GREAT LAKES DREDGE & DOCK COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT THE CITY OF CHICAGO IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY PROVISION:

IN THE

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Respondents.

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---

BRIEF FOR RESPONDENT THE CITY OF CHICAGO IN SUPPORT OF THE PETITION

Respondent the City of Chicago respectfully requests that this Court grant the petition for certiorari but that it defer consideration of the petition until after January 5, 1994, when the City will file its own petition from the same judgment.[1]

ARGUMENT

This case began with the filing of a complaint in admiralty by respondent Great Lakes Dredge & Dock Co. seeking exoneration from or limitation of liability, as well as indemnity and contribution from the City of Chicago, after the City and Great Lakes were sued in state court

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[1] The Petition for Certiorari does not identify the City of Chicago as a respondent. See Pet. ii. The City of Chicago was a party to the proceedings below, however, and hence is a respondent in this Court under this Court's Rule 12.4.

for their alleged role in causing the underground flooding of the Chicago business district on April 13, 1992. The state court action, now on interlocutory appeal to the Illinois Appellate Court on a number of questions of law, involves tens of thousands of plaintiffs and claims of hundreds of millions of dollars in damages. The Seventh Circuit in this case held that Great Lakes had properly invoked federal admiralty jurisdiction, relying on *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court's most recent case concerning the scope of federal admiralty jurisdiction. Petitioner Jerome B. Grubart, Inc. ("Grubart"), obtained a stay of the Seventh Circuit's mandate under Fed. R. App. P. 41, which obligated Grubart to file its petition for certiorari within 30 days of the Seventh Circuit's judgment. The City did not seek a stay and will file its petition within the 90 days allowed by this Court's Rules.

For reasons that we shall explain in more detail in our petition, the decision below amply warrants review by this Court. The Seventh Circuit's decision that Great Lakes properly invoked federal admiralty jurisdiction conflicts with decisions of other courts of appeals and with prior decisions of this Court, including *Sisson*. The decision also raises fundamental and recurring questions concerning the scope of federal admiralty jurisdiction that should be addressed by this Court, particularly given that the Seventh Circuit's resolution of the issue is manifestly incorrect. Finally, the Seventh Circuit's decision raises substantial federalism questions because it ousts state law in any case within the admiralty jurisdiction. See, *e.g.*, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). As a result, if the decision below stands, what are quintessentially state tort claims now pending in state court will be tried in federal court under federal common law.

The importance of this last point cannot be overemphasized. In this case, the shift from state court to federal court may seriously skew the outcome of the litiga-

tion. The City has raised a number of state law immunities in the state court litigation, the applicability of some of which are now on appeal to the state appellate court. The validity of such immunities in admiralty, however, may well be subject to a different analysis, and the application of federal law may result in a different outcome. Cf. *Workman v. Mayor of New York*, 179 U.S. 552 (1900) (municipality may not assert sovereign immunity as a defense to a maritime claim). Thus, if this case goes forward in admiralty, the City could be stripped of the tort immunities that might otherwise apply in state court. Great Lakes, by contrast, has sought refuge in the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §§ 181-96, which would limit its liability for its part in the multi-million dollar flood to the value of the two barges and one tug that it used to perform the work that allegedly caused the flood. See Pet. App. 2, 27-28, 36-38. If Great Lakes is successful in its limitation action, and the City's state law immunities are not credited in federal court, the City would, if found negligent, bear the entire financial consequences for the flood. There is little reason to think that this would be the result in state court.

As the district court stated in dismissing Great Lakes' admiralty complaint (Pet. App. 39-40):

> [T]he relevant facts alleged to be present in this now historic calamity to our city do not involve traditional maritime concerns. Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules. Traditional common law rules of tort and contract should do quite nicely in the resolution of the material disputes here; the specialization of admiralty rules is not necessary. The totality of circumstances lead unyieldingly to that conclusion.

> Simply put, we have land-based injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and supply none of the causation for the alleged injuries. There are no traditional maritime concerns present here and, without it, no admiralty jurisdiction.

In our petition, we plan to raise essentially the same questions that are presented in this petition, and to elaborate upon the reasons that both petitions should be granted. We also plan to highlight the effect of the decision below on the tort liabilities and immunities of state and local governments, a matter not discussed in Grubart's petition. For these reasons, this Court's time will be most efficiently allocated if it considers both petitions together. We therefore suggest that the Court defer consideration of the petition until after the City's petition is filed on January 5, 1994, and any other party wishing to respond has had time to do so. At that time, this petition and the City's should both be granted.

CONCLUSION

This case should be consolidated with the petition the City will file on January 5, 1994. Both petitions for certiorari should then be granted.

Respectfully submitted,

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(2) (2)

Nos. 93-762 and 93-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY
and CITY OF CHICAGO,
Respondents.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY
and JEROME B. GRUBART, INC.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT GREAT LAKES DREDGE & DOCK COMPANY IN OPPOSITION

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26 pp

QUESTION PRESENTED FOR REVIEW

Whether this Court should review the Seventh Circuit's decision sustaining admiralty jurisdiction where that decision is based on the application of settled law—*Sisson v. Ruby*, 497 U.S. 358 (1990)—and no conflict exists in the Circuits.

ADDITIONAL PARTIES PURSUANT TO SUPREME COURT RULES 24.1(b) AND 29.1

Respondent Great Lakes Dredge & Dock Company's parent is Great Lakes International, Inc. Great Lakes International, Inc.'s parent is Great Lakes Dredge & Dock Corporation.

First National Bank of Chicago appeared as a claimant in the underlying district court Limitation Act proceeding.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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CITY OF CHICAGO,
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v.

GREAT LAKES DREDGE & DOCK COMPANY
and JEROME B. GRUBART, INC.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT GREAT LAKES DREDGE & DOCK COMPANY IN OPPOSITION

Respondent, Great Lakes Dredge & Dock Company, respectfully requests that this Court deny the Petitions for a Writ of Certiorari filed by Petitioners Jerome B. Grubart, Inc. and the City of Chicago.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

UNITED STATES CONSTITUTION

U.S. Const. art. III, § 2.

The judicial Power shall extend . . . to all Cases of admiralty and maritime jurisdiction . . .

* * * *

JUDICIARY ACT OF 1949

28 U.S.C. § 1333.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

. . .

* * * *

ADMIRALTY EXTENSION ACT

46 U.S.C. § 740.

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

. . .

* * * *

VESSEL OWNER'S LIMITATION OF LIABILITY ACT

46 U.S.C. § 183(a).

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or

thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. . . .

46 U.S.C. § 185.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended . . . Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 188.

Except as otherwise specifically provided therein, the provisions of the nine preceding sections and of section eighteen of the act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes," approved June twenty-sixth eighteen hundred and eighty-four (23 Stat. 57), shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

* * * *

CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Rule 40(f).

Rehearing Sua Sponte before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (e.g., overruling *Doe v. Roe.*)

STATEMENT OF THE CASE

During the summer and fall of 1991, Respondent Great Lakes Dredge & Dock Company ("Great Lakes") performed a marine construction contract it had entered into with Petitioner the City of Chicago ("the City") to remove and replace pile clusters, known in the trade as "dolphins," at five bridge sites in the Chicago River. To perform this work, Great Lakes used a tugboat and barges to extract the old wooden pilings and install new ones. (App. 2); 3 F.3d at 226.[1] Great Lakes' tugboat and

[1] In the Court of Appeals, Great Lakes included all of the Record documents to which it cited in a separately bound Appendix to its opening Brief on Appeal. For consistency, citations in this Brief to those same documents are denoted "App. ——", as they are in the Court of Appeals. Citations to other documents in the Record are denoted "R. ——". The Seventh Circuit's decision in this case, *Great Lakes Dredge & Dock Co. v. City of Chicago*, is reported at 3 F.3d 225 (7th Cir. 1993).

barges operated in the navigable channel of the Chicago River, moving out of the channel whenever another vessel sought passage. (App. 22-24, 33-34, 41-42, 51-54, 80). The tugboat also regularly towed the barges from work site to work site and repositioned the barges at the worksites whenever necessary. *Id.* One of Great Lakes' barges transported the crane used for extracting and driving piles from Great Lakes' yard on the Calumet River to and from each Chicago River work site; this barge also transported the work crews from site to site. (App. 22-24, 41-43, 47). The other barge transported new pilings from Great Lakes' Calumet River yard to the work sites several miles away, stowed the old pilings until the work was completed, and then transported the old pilings back to Great Lakes' yard. (App. 22-24, 33-34, 41-47, 51-54).

Great Lakes' work had to be performed from vessels located in the navigable channel, as the dolphins could not be reached by land. (App. 29, 50, 113-16). The marine construction contract between Great Lakes and the City specifically required Great Lakes to supply all necessary equipment, including "barges, cranes [and] tugs." (App. 113). The contract required Great Lakes to provide a warning about its river activities to commercial navigators and to clear the channel whenever another vessel sought passage. (App. 50-51, 111-12). According to the contract, "the passage of vessels has first priority . . ." (App. 115). Great Lakes provided the requisite notices to the U.S. Coast Guard for publication in its official *Notice to Mariners* and honored vessel rights of passage throughout the months its vessels worked on the river. (App. 22, 24, 33-34, 50-51, 56-72).

On April 13, 1992, water from the Chicago River entered a freight tunnel running under the river through

a breach in the tunnel near the Kinzie Street bridge and quickly flooded the tunnel system underlying Chicago's downtown area, causing flooding to a number of buildings connected to the tunnels. (This event became known as the "Chicago Flood"). As a result, maritime traffic on the Chicago River in the vicinity of the tunnel rupture was disrupted and the Captain of the Port of Chicago closed all three branches of the Chicago River in the downtown Chicago area for more than a month. 3 F.3d at 226 n.1.

In the days and weeks immediately following the Chicago Flood, thousands of individuals and businesses filed suit in Illinois state court against Great Lakes. These plaintiffs alleged that Great Lakes negligently installed the river dolphins at the work site located in the vicinity of the Kinzie Street bridge, thereby causing the breach in the tunnel and, in turn, the Chicago Flood. The plaintiffs also alleged that the City was negligent in the performance of its responsibilities under the dolphin replacement contract, including failing to disclose to Great Lakes the existence of the tunnel in the vicinity of the Kinzie Street work site. 3 F.3d at 226. *See also* App. 4; R. 44, Tab A (state court consolidated class action complaint); *American Protection Ins. Co. v. Great Lakes Dredge & Dock Co.*, No. 93 M1 12557 (1st Municipal District, Cook County, Illinois) (alleging damage to subrogor's floating docks because the level of the river was lowered and then raised).

On October 6, 1992, Great Lakes timely filed an action in federal district court under the Vessel Owner's Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*, seeking exoneration from or limitation of liability in connection with its alleged role in causing the Chicago Flood. Great Lakes also asserted that the City was responsible for the Chicago Flood because the City negligently failed to disclose the existence of the tunnel near the Kinzie Street bridge to Great Lakes at the time the City hired Great Lakes to perform the dolphin replacement contract or

at any time thereafter. Great Lakes also contended that the City failed to repair and maintain the tunnel after the City received notice of the breach. 3 F.3d at 226; App. 8-12.

Petitioner Jerome B. Grubart, Inc. ("Grubart"), a Chicago business, filed a claim in the federal admiralty proceeding, and both Grubart and the City moved to dismiss Great Lakes' complaint. Grubart and the City contended that the district court lacked subject matter jurisdiction over Great Lakes' claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and, in the alternative, moved to dismiss Great Lakes' claim pursuant to Rule 12(b)(6) for failure to state a claim. 3 F.3d at 226.

The district court granted the motions to dismiss on both grounds. The Court of Appeals reversed both rulings of the district court. First, the Court of Appeals held that "the incident giving rise to the damage of which the City and Grubart complains satisfies all of the prerequisites of admiralty jurisdiction identified in *Sisson* [*v. Ruby*, 497 U.S. 358 (1990)]." 3 F.2d at 230. Second, the Court of Appeals held that Great Lakes' complaint stated a valid basis for recovery under the Limitation Act. *Id.* at 227, 231-32.

Applying the three-part test identified in *Sisson*, the Court of Appeals first held that the "locality" requirement for admiralty jurisdiction is satisfied. The court noted that "the Chicago River, and all of its branches, is a navigable waterway of the United States. *See Escanaba Co. v. City of Chicago*, 107 U.S. 678, 683 (1883)." 3 F.3d at 229. Moreover, the Court of Appeals stated that there is no dispute that Great Lakes' vessels were located in the "navigable channel" of the Chicago River while engaged in the removal and replacement of the dolphins. *Id.* The Court of Appeals further concluded that "there is no doubt" that Great Lakes' barges are vessels, because they are capable of, and have performed, transportation of passengers, cargo and equipment from place to place over navigable waters. *Id.*

Second, the Court of Appeals held that maritime commerce on the river "was *actually* disrupted for more than a month." *Id.* at 230 (emphasis in original). Thus, the Court held that the installation of pilings from barges located in the navigable channel of the Chicago River not only creates a potential to disrupt commercial maritime activity, but in fact did disrupt maritime commerce. *Id.*

Finally, the Court of Appeals held that "[t]here is no dispute that dolphins are capable of, and generally do, serve . . . the purposes . . . of . . . protecting ships from collisions with bridges and aiding navigation, [which] are unquestionably related to maritime activity." Thus, "the installation of dolphins relates to maritime activity." *Id.*

In their separate Petitions, Grubart and the City challenge only the Court of Appeals' holding that admiralty jurisdiction applies to this case. They do not challenge the Court of Appeals' decision that Great Lakes' complaint properly stated a claim under the Limitation Act.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. This case involves only the Seventh Circuit's application of the well-settled test for admiralty jurisdiction most recently articulated by this Court in *Sisson v. Ruby*, 497 U.S. 358 (1990). *See* U.S. Supreme Court Rule 10.1.

2. No conflict in the Circuits exists concerning the appropriate admiralty jurisdiction test. The cases cited by Petitioners do not conflict with the analysis mandated by *Sisson* and conducted by the Seventh Circuit. *Id.*

3. Petitioners' arguments call for nothing more than a review of the correctness of the Seventh Circuit's fact-bound application of the *Sisson* test. *Id.*

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT FULLY CONSIDERED AND PROPERLY APPLIED WELL-SETTLED SUPREME COURT PRECEDENT

The Seventh Circuit adhered to the admiralty jurisdiction test mandated by this Court in *Sisson v. Ruby*, 497 U.S. 358 (1990). Because the Seventh Circuit correctly identified and applied each element of that well-settled test, the Petitions for *Certiorari* should be denied.

A. The Supreme Court's Criteria for Invoking Admiralty Jurisdiction Are Well Settled

Sisson is the third in a trilogy of cases in which this Court established the framework for determining whether admiralty jurisdiction exists in a case. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). Relying on *Executive Jet* and *Foremost*, this Court in *Sisson* identified a three-part test for invoking admiralty jurisdiction. First, the incident must have occurred on navigable waters. *Sisson*, 497 U.S. at 361. Second, based on "the general features of the type of incident involved," the incident must have the "potential [for] disruption to commercial maritime activity." *Id.* at 363. And third, the "general character of the activity" from which the incident arose must have "a substantial relationship to a 'traditional maritime activity.'" *Id.* at 364-65. The Court in *Sisson* stated that this test "provides appropriate and sufficient guidance to the federal courts." *Id.* at 366 n.4.

B. The Seventh Circuit's Analysis Followed the *Sisson* Test

The Seventh Circuit followed the mandate of *Sisson* precisely. Thus, the Court of Appeals framed the admiralty jurisdiction inquiry as follows:

> After *Sisson*, in ascertaining the existence of admiralty jurisdiction we ask three questions about the

> incident giving rise to the alleged wrong: (1) did it occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity? If all three questions are answered in the affirmative, a claim arising out of the incident falls within the admiralty jurisdiction.

Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225, 228 (7th Cir. 1993). Having identified the correct inquiry, the Court of Appeals then analyzed the three questions posed in *Sisson* and answered each in the affirmative. The Court also properly analyzed the impact of the Admiralty Extension Act on this case and applied it precisely as directed by Congress.

1. *The Incident Occurred on the Navigable Waters of the United States*

The Seventh Circuit properly held that the first prong of *Sisson*—the situs element—was met because Great Lakes was charged with alleged negligence in removing and replacing river dolphins off of barges located in the navigable channel of the Chicago River. As the Seventh Circuit correctly concluded, the locality requirement was easily satisfied:

> There can be no doubt that the Chicago River, and all of its branches, is a navigable waterway of the United States. . . . Nor is there any dispute that Great Lakes' vessels were located in the navigable "channel" of the Chicago River while engaged in the removal and replacement of the pile clusters. Hence, it follows that the alleged tort—the negligent driving of pilings into the riverbed—occurred on a navigable waterway.

3 F.3d at 229 (citations omitted).

In addition, the Court of Appeals concluded that the Admiralty Extension Act covered precisely the situation presented by this case. The Admiralty Extension Act provides that admiralty jurisdiction:

> shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. § 740. The Seventh Circuit observed that this Act "seems explicitly to address situations, like this one, where the injury-causing activity occurs on a vessel on a navigable waterway but the injury itself is felt on land. 3 F.3d at 229-30 n.5.

2. *The Incident Posed a Potential Hazard to Maritime Commerce*

Under the second prong of the *Sisson* analysis, the Seventh Circuit properly concluded that the underlying incident disrupted maritime commerce on the Chicago River for over one month. The Court of Appeals stated:

> We are led to ask: Did the installation of pilings from barges located in the navigable channel of the Chicago River create a potential to disrupt commercial maritime activity? This is not a case, like *Foremost* or *Sisson*, in which we must imagine the various ways in which the installation of pilings might disrupt travel on the river. Because commerce on the river was *actually* disrupted for more than a month, this question answers itself. Yes, there was such a potential. In fact, it was realized.

3 F.3d at 230 (emphasis in original; footnotes omitted). This is exactly the inquiry mandated by the *Sisson* Court, which held that the "court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Sisson, supra*, 497 U.S. at 363. No hypothesizing is needed in this case because it is undisputed that commercial barge traffic ceased, commuter ferries were stranded and the Captain of the Port of Chicago closed down the heart of the Chicago River to all maritime traffic for over one month. 3 F.3d at 226 n.1.

3. *The Activity in Which Great Lakes Was Engaged Is Substantially Related to Traditional Maritime Activity*

The Seventh Circuit correctly held that Great Lakes' installation of dolphins into a riverbed from barges located in a navigable river constitutes a traditional maritime activity. As the Court stated:

> we must determine if the activity in which Great Lakes was engaged is substantially related to traditional maritime activity. . . . [W]e are concerned only with "the general character of the activity." *Sisson*, 497 U.S. at 365 . . . There is no dispute that dolphins are capable of, and *generally* do, serve all the purposes mentioned [by the parties], two of which, protecting ships from collisions with bridges and aiding navigation, are unquestionably related to maritime activity. It follows logically that the installation of dolphins is related to maritime activity.

3 F.3d at 230 (emphasis in original; citations omitted). This conclusion is also supported by a century of cases applying admiralty jurisdiction to the installation and repair of pilings in navigable bodies of water.[2]

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[2] *See, e.g., In re The V-14813*, 65 F.2d 789, 790 (5th Cir. 1933) ("[t]here are many cases holding that a dredge, or a barge with a pile driver, employed on navigable waters, is subject to maritime jurisdiction"); *In re New York Dock Co.*, 61 F.2d 777 (2d Cir. 1932) (admiralty jurisdiction over scow driving piles for a Harlem River dock); *In re P. Sanford Ross, Inc.*, 196 F. 921 (E.D.N.Y. 1912) (admiralty jurisdiction over pile driving barge whose owner sought limitation), *rev'd on other grounds*, 204 F. 248 (2d Cir. 1913); *Lawrence v. The FLATBOAT*, 84 F. 200 (S.D. Ala. 1897) (admiralty jurisdiction over tort claim involving a pile driver on a flatboat), *aff'd sub nom. Southern Log Cart & Supply Co. v. Lawrence*, 86 F. 907 (5th Cir. 1898).

II. PETITIONERS' ATTEMPT TO MANUFACTURE A CONFLICT AMONG THE CIRCUITS WHERE NONE EXISTS MUST FAIL

Petitioners attempt to manufacture a conflict where none exists by pointing to post-*Sisson* decisions of several Courts of Appeals which have considered multiple factors in analyzing whether an activity is substantially related to traditional maritime activity (the third *Sisson* inquiry). These factors, which Petitioners refer to as the "totality of the circumstances" or the *Kelly* test, identified approximately twenty years ago in *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), include the functions and roles of those involved, the types of vehicles and instrumentalities involved, the type of injury, and traditional concepts of the role of admiralty law. *See, e.g., Sisson*, 497 U.S. at 365 n.4. Petitioners contend that the Seventh Circuit did not expressly consider each of these factors in its analysis of the underlying activity and therefore a split in the Circuits exists.

Petitioners have identified no conflict at all because the *Kelly* test is simply an articulation of factors that may be, but after *Sisson* are not always, part of the general characteristics of the relevant activity. This Court in *Executive Jet*, *Foremost* and *Sisson* set forth guiding, unifying principles for determining whether the relevant activity, *i.e.*, the activity which gave rise to the incident, is substantially related to traditional maritime activity. 497 U.S. at 364. The first step is to define the relevant activity. *Id.* Then the court determines whether the activity has a substantial relationship to a traditional maritime activity. *Id.* at 364-65. Further, this Court stated that "the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." *Id.* at 364. In other words, the focus must be "on the general character of the activity." *Id.*

Each of the Circuits which refer to the *Kelly* factors subjects each factor to this "general characteristics" cruci-

ble as required by *Sisson*. *See, e.g., Price v. Price*, 929 F.2d 131, 136 (4th Cir. 1991) (court acknowledged that it was "bound to apply the principles of *Foremost* and *Sisson*" and to that end must ask "whether the core activity giving rise to Mr. Price's alleged negligent conduct was related to an activity which is traditionally maritime"); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 885 (5th Cir. 1993) (in connection with the examination of the *Kelly* factors, "[o]ur analysis today is further guided by the Supreme Court's recent pronouncement in *Sisson*."). *See also Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 314 n.2 (9th Cir. 1993); *Penton v. Pompano Construction Co.*, 976 F.2d 636, 640 (11th Cir. 1992); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625, 634 (D.C. Cir. 1991).

The Seventh Circuit also precisely followed the analysis mandated by *Sisson*. In determining whether the activity which gave rise to the incident was substantially related to traditional maritime activity, the Court focused, as *Sisson* commands, on "the general character of the activity." 3 F.3d at 230. Therefore, whether or not the Seventh Circuit specifically identified each of the *Kelly* factors, the substance of the analysis, and the result yielded, is the same through adherence to *Sisson*'s principles.

This Court has acknowledged that these approaches are by no means incompatible. In *Sisson*, the Court concluded that it did not need to choose between the *Kelly* approach and other Circuits' approaches, because "the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance to the federal courts." 497 U.S. at 366 n.4.

Thus, the Seventh Circuit's analysis is not in conflict with the analysis of any other Circuit. True to *Sisson*, the Seventh Circuit focused on the general characteristics of

the relevant activity—installation of dolphins off of vessels operating in a navigable river—and gave no weight to those factors which were not part of the general character of the activity. Plaintiffs who have no connection to the activity which gave rise to the incident, except for the damages they allegedly suffered because of the fortuity that they were in harm's way, are not part of the general characteristics of the relevant activity. Nor are they "instrumentalities" in the activity or the incident to which the activity gave rise. 497 U.S. at 365 n.3.

As a result, the Seventh Circuit properly did not give any weight to the occupation of Grubart (a shoe store operator) or the other plaintiffs who had no role in the relevant activity. On the other hand, the City's role in the pertinent events was quintessentially maritime, because the City was the contracting party, with Great Lakes, to the maritime contract for the removal and installation of the dolphins. Thus, contrary to Petitioners' assertions, this is not a case in which one instrumentality is engaged in a traditional maritime activity and the other is not. *Id.* The *Kelly* approach, as guided by *Sisson*'s requirements, yields exactly the same results.

Significantly, no Court of Appeals, including the Seventh Circuit, has declared, or even intimated the existence of, a split in the Circuits or a departure from *Sisson*. The Seventh Circuit panel did not circulate the opinion in this case to all judges in the Circuit in advance of publication as is required for any Seventh Circuit decision which creates a conflict in the Circuits. *See* Seventh Circuit Rule 40(f) ("A proposed opinion . . . which would . . . create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court . . ."). Moreover, Grubart specifically raised its manufactured Circuit split in its petition for rehearing. All of the judges on the original panel voted to deny a rehearing, and no members of the Court requested a vote for rehearing *en banc*. *See* City Petition, p. 19a.

III. THE SEVENTH CIRCUIT'S FACT-BOUND APPLICATION OF THE *SISSON* TEST PROVIDES NO BASIS FOR PLENARY REVIEW

The Seventh Circuit's decision is based on its fact-bound application of the *Sisson* test and does not merit plenary review. *See* Supreme Court Rule 10.1. Furthermore, each of Petitioner's challenges is meritless.

A. The Seventh Circuit Correctly Applied the Admiralty Extension Act

Petitioners claim that the Seventh Circuit misapplied the situs analysis—the first *Sisson* factor. In making this challenge, Petitioners argue that the Seventh Circuit relied on the Admiralty Extension Act to extend the scope of admiralty jurisdiction beyond permissible boundaries. City Petition, p. 11. The City contends that this Court's decision in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), bars application of the Admiralty Extension Act to this case, because the damage which the plaintiffs suffered, occurring as it did six months after Great Lakes allegedly committed the negligence and, in some cases, several blocks from the location of Great Lakes' work, is too "remote" under *Gutierrez* to invoke admiralty jurisdiction. Moreover, according to the City, the Seventh Circuit's "expansive reading of the Admiralty Extension Act" "ignor[ed] the federalism implications of its decision . . ." City Petition, pp. 13, 15. The City complains that the result in this case may be different under admiralty jurisdiction than it would be under Illinois law, because the City may be immune from tort liability under Illinois' Governmental Tort Immunity Act but would lose that immunity if admiralty jurisdiction applies. *See Workman v. New York City*, 179 U.S. 552 (1900).

None of these arguments has any merit. The Court of Appeals carefully addressed the situs element and concluded that the jurisdictional incident occurred on navigable waters. 3 F.3d at 229. After reaching this conclusion,

the Court correctly rejected Petitioners' contention that the situs element was not satisfied because Grubart and many others were damaged on land. As the Court of Appeals noted, the Extension Act expressly provides for admiralty jurisdiction where the injury-causing activity occurs on navigable water but the injury itself is felt on land. 3 F.3d at 229 n.5.

Moreover, as the Seventh Circuit correctly stated, the remoteness concept referred to in *Gutierrez* deals with proximate causation. 3 F.3d at 229. In the present case, the plaintiffs allege that their damages resulted proximately from Great Lakes' negligent performance of its marine construction activities on navigable water. *Id.* at 226. Under *Sisson* the location element is satisfied, and under the Admiralty Extension Act the fact that the damages were felt on land, even though somewhat "remote" in a geographic sense from the location of Great Lakes' alleged negligence, does not take the case out of admiralty jurisdiction. As the Seventh Circuit noted, a contrary result "would render the Admiralty Extension Act meaningless." 3 F.3d at 229-30 n.5.

Still further, the Seventh Circuit's fact-bound analysis in no way violates federalism principles. The Supreme Court has, in its trilogy of jurisdiction cases, supplied the framework for determining whether a case falls within admiralty jurisdiction. The Court's jurisdiction test is in part a product of federalism concerns and was constructed precisely to permit the courts to reach the correct jurisdictional result. This is why the *Sisson* test requires both the situs on navigable water and nexus to traditional maritime activity elements to be satisfied before admiralty jurisdiction will be invoked. If the test is satisfied, then the case falls within admiralty jurisdiction, the federal courts have original jurisdiction and maritime law applies. U.S. Const. art. III, § 2; 28 U.S.C. § 1333; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).[3] As a result,

[3] Contrary to Petitioners' contention that the Seventh Circuit failed to consider "traditional concepts of the role of admiralty

this case is not at the crossroads of state and federal jurisdiction as the City contends, but squarely within admiralty. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971). In such a case, federalism mandates application of admiralty law. The fact that state law may differ from admiralty law on a given issue in a given case has no independent impact on the determination of which jurisdiction the case is subject to in the first instance.[4]

B. The Seventh Circuit Did Not Err in Its Identification of the Relevant Activity and Incident in Issue

Petitioners also argue that the Seventh Circuit mischaracterized the relevant activity and incident to be analyzed. Their arguments are meritless.

Grubart contends that the "activity" bearing a substantial relationship to a traditional maritime activity must be different from the "incident" giving rise to the claim, and that the Court of Appeals incorrectly confused the activity and the incident by defining both as the installation of pilings in a river. Grubart Petition, pp. 17-18. In fact, the Court of Appeals correctly defined the general activity in question as pile driving in a riverbed (3 F.3d at 230), and the incident as "the *negligent* driving of pilings into the riverbed." *Id.* at 229 (emphasis added). The Court's identification of the jurisdictional incident mirrors Grubart's and the other plaintiffs' own contentions in their complaints that Great Lakes' negligent installation of

law" (City Petition, p. 10), the Seventh Circuit fully considered this issue in determining that the general character of the activity was substantially related to maritime commerce and that all of the other elements of the *Sisson* test were satisfied.

[4] The City's argument that invocation of admiralty jurisdiction is "unjust because [it] may ultimately shield Great Lakes from liability" for much of the damages sought by plaintiffs (City Petition, p. 14) is not a basis for granting plenary review. Great Lakes is merely seeking to exercise the rights granted to it by statute—the Limitation Act. Repealing that right is a legislative, not a judicial, prerogative.

river dolphins is the incident which caused their damage. 3 F.3d at 226.

The City also claims that the Court of Appeals misidentified the activity at issue, but takes a different tack. The City contends that the activity giving rise to the incident "was not pile driving . . . but the operation and maintenance of an underground tunnel." City Petition, p. 17. The City then contends that "failure to repair the tunnel is not substantially related to maritime commerce." *Id.*, p. 18.

In making this argument, the City ignores the plaintiffs' complaints against Great Lakes. Plaintiffs claimed that Great Lakes negligently installed the river dolphins and that Great Lakes' negligence caused the flood and plaintiffs' consequent harm. R. 44, Tab A. *See* 3 F.3d at 226. As the Court of Appeals put it, the alleged "tort at the heart of this litigation [is] Great Lakes' alleged negligence." 3 F.3d at 227.

CONCLUSION

For all of the foregoing reasons, Great Lakes requests that the Petitions for a Writ of *Certiorari* be denied.

Respectfully submitted,

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No. 93-762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,

Petitioner,

v.

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

No. 93-762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioner,

v.

GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

The Supreme Court in *Sisson v. Ruby*, 497 U.S. 358 (1990), did not establish a rule of law for invoking admiralty jurisdiction for every circumstance. It explicitly reserved ruling on how its test might need to be refined if faced with the situation where the relevant parties were not engaged in "similar types of activity." 497 U.S. at 365-366 nn.3, 4.[1] That situation is now squarely before the Court.

[1] Respondent twice misquotes *Sisson* by stating that the three-pronged test "provides appropriate and sufficient guidance to the federal courts." Response at 9, 14, *quoting* 497 U.S. at 366 n.4. Respondent cut off the qualifier language at the beginning of the quote. What the *Sisson* Court actually said is that its test provided sufficient guidance, "at least in cases in which all of the relevant entities are engaged in similar types of activity. . . ." *Id.*

This case was decided by the Seventh Circuit under a particular rule. The same facts would have been decided in the Fifth Circuit or the Ninth Circuit under a different rule, and with a different result, just as it was by the district court. There is, therefore, a conflict of applicable rules of law between or among the Circuits. It cannot matter for this Court's purposes whether the Seventh Circuit acknowledges the existence of the conflict, as Respondent suggests.

The Court of Appeals employed a "rigidly structured" analysis of the three questions comprising the *Sisson* test in deciding that admiralty jurisdiction applied. *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993). Policy considerations were ignored along with any other factors not deemed relevant to answering the three questions posed in *Sisson*. 3 F.3d at 228-229. In contrast, the district court, following the approach of other Circuits, looked to the entire *Sisson* opinion and the evolution of the Court's test to analyze the jurisdiction issue. It applied a totality of the circumstances approach within the context of the *Sisson* principles in determining that the non-maritime factors and concerns far outweighed the few maritime attributes.

By limiting itself to asking only three questions, the Seventh Circuit ignored the role and functions of the thousands of injured parties in this matter. At best, only the Respondent was engaged in a maritime activity; none of the injured parties were. The differing activities of the parties, as *Sisson* recognized, creates a circumstance not present in *Sisson*, or in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). 497 U.S. at 365 n.3. The *Sisson* Court left open the question whether its three-pronged test would suffice in this situation, and

suggested that further refinement of the test would be necessary. 497 U.S. at 365-366 nn.3, 4. Moreover, the Court *never* suggested that the three-pronged test should be mechanically applied or that the substantial policy interests underlying its development should be ignored.

The Seventh Circuit confronted the jurisdictional inquiry as if the situation before it was the same as in *Sisson*, *Foremost*, and *Executive Jet*. The circumstances of the parties here are materially different and the Seventh Circuit's failure to recognize the significance of this dissimilarity caused it to deem irrelevant facts and factors that could not be pigeonholed into the three-pronged test. By refusing to look beyond the three questions, the Court of Appeals decreed that no refinement of the *Sisson* test is necessary or possible, regardless of the different activities of the parties or the existence of the many other factors militating against the application of admiralty jurisdiction.

In an effort to soften the Seventh Circuit's extremist position, Respondent contends that the Court of Appeals considered the substance of the *Kelly* elements (*Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973)), even if it did not specifically identify them. *See* Response at 14. Not only did the Seventh Circuit clearly and unequivocally state to the contrary, but even Respondent does not seem to believe it. One of the four *Kelly* factors is the function and role of the parties. Yet, Respondent concedes that the Court of Appeals "gave no weight" to the activities of Grubart and the other plaintiffs. Response at 15. As previously mentioned, the Seventh Circuit also excluded a policy analysis from its examination, another factor required by *Kelly* and every other Circuit which has interpreted *Sisson*. *See, e.g., Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131 (4th

Cir. 1991); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636 (11th Cir. 1992); *see also, Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625 (D.C. Cir. 1991). The Seventh Circuit's statements and reasoning cannot be rehabilitated by Respondent's revisionist explanations.

Respondent argues in the alternative that consideration of the *Kelly* factors is "not always" required after *Sisson*. Response at 13. Thus, for the first time, Respondent aligns itself with Petitioner and the district court as to the limited breadth of the three-pronged *Sisson* test when not all of the instrumentalities or relevant entities are engaged in similar types of activity. *See* 497 U.S. at 365-366 nn.3, 4. Standing alone in the other corner is the Seventh Circuit, unable or unwilling to acknowledge that a "totality of the circumstances" approach is ever appropriate or necessary after *Sisson*. The Seventh Circuit stoically resists looking beyond the three *Sisson* questions and simply dismisses the relevance of other troubling factors in the jurisdictional inquiry or bootstraps the analysis with the Admiralty Extension Act, 46 U.S.C. § 740 (1988). This nihilism runs directly counter to this Court's admonition that the different activities of the parties may require additional refinement of its test.

Rarely is any judicial pronouncement or tenet cast in stone or framed to cover every situation. The Seventh Circuit has, in effect, declared that the *Sisson* three-pronged test fits the bill in every case, regardless of the circumstances. Its reasoning has produced the same injustices and anomalies as the old strict locality test which *Executive Jet*, *Foremost*, and *Sisson* sought to redress. Progress is not gained by latching on to a new set of tidy rules.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR CERTIORARI (No. 93-1094) FILED JANUARY 5, 1994
CERTIORARI GRANTED FEBRUARY 22, 1994

86 pp

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TABLE OF CONTENTS

LIST OF OMITTED ITEMS

The following opinions, decisions, judgments, and orders have been omitted from this joint appendix because they appear on the following pages in the appendices to the Petitions for Writ of Certiorari (Nos. 93-762 & 93-1094):

No. 93-762

No. 93-1094

Nos. 93-762 and 93-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Civil Docket for Case #92 CV 6754
Filed 10/6/92

* * * *

10/6/92—COMPLAINT—Civil cover sheet.

* * * *

10/6/92—AFFIDAVIT of Mark R. Thomas of value and pending freight.

10/6/92—MOTION by plaintiff for entry of orders ancillary to its complaint for exoneration from or limitation of liability.

* * * *

10/8/92—AGREED ORDER regarding motion for entry of orders ancillary to its complaint for exoneration from or limitation of liability.

10/8/92—ORDER for ad interim stipulation regarding motion for entry of orders ancillary to its complaint for exoneration from or limitation of liability.

10/8/92—MINUTE ORDER of 10/8/92 by Hon. Charles P. Kocoras: Granting in part and denied in part plaintiff's motion for entry of orders ancillary to its complaint for exoneration from or limitation of liability. Enter order for ad interim stipulation.

10/8/92—AD INTERIM STIPULATION and cost bond.

* * * *

11/2/92—MEMORANDUM by plaintiff in opposition to certain potential claimants' motion to lift the stay.

* * * *

11/3/92—MOTION by Julie Mome Inc, G.P. Antons Restaurant & Lounge, Dr. Richard Cook, Tiffany Wilson, et al., Merced E. Zuniga, et al., M.J. Miller & Co., Inc., et al., Norman C. Berliant, et al., plaintiffs in the consolidated class action commonly known as In Re Chicago Flood Litigation for partial lift of stay; notice of motion.

* * * *

11/3/92—MINUTE ORDER of 11/3/92 by Hon. Charles P. Kocoras: Denying plaintiffs in 92 L 5422, pending in the Circuit Court of Cook County, motion for partial lift of stay.

* * * *

11/5/92—MOTION by plaintiffs Hugh C Michels & Co, Kanter & Mattenson Ltd, Merit Insurance Co, Aera Crockett, M J Miller & Co Inc, Edwin J. Mills, Capitol Snax Inc, Dr. Richard Cook, Tiffany Wilson, Le Pecque Women's Apparel, Jac-Lin, Merced E Zuniga, Dr. Donald L. Hohman, AVCOA Inc, Jolie Mome Inc, Marilyn Hollander, Norman C Berliant, Fish Port Inc, Fisherman's Paradise Inc, Hedlund Corp, Hoe Know Chinese Restaurant Ltd, Oriental Electronics Inc, R & L Fashions Inc, Randolph Flower Shop Inc, Soul by the Pond Inc, Royal Redemption Center Inc, Young Sik Jong for intervention.

* * * *

11/5/92—MEMORANDUM by plaintiff Great Lakes Dredge & Dock Co in opposition to certain potential claimants' motion to intervene.

* * * *

11/5/92—ADMIRALTY CLAIM by claimant First Natl Bk of Chgo.

* * * *

11/6/92—MINUTE ORDER of 11/6/92 by Hon. Charles P. Kocoras: Denying Hugh C. Michels & Co. et al's pending motion for intervention with leave to reinstate the motion later, if needed. Said parties are given leave to file claim and answer pursuant to Rule F of the Supplemental Rules for Admiralty and Maritime proceedings.

* * * *

11/6/92—CLAIM by claimant Jerome B Grubart Inc with answer.

* * * *

11/6/92—ANSWER by claimant Jerome B Grubart Inc with claim.

* * * *

11/16/92—MOTION by defendant to dismiss the complaint.

11/16/92—MEMORANDUM by defendant in support of its motion to dismiss the complaint.

11/16/92—APPENDIX filed by defendant to motion to dismiss the complaint.

* * * *

11/16/92—MOTION by claimant Jerome B Grubart Inc to dismiss count I of plaintiff's complaint.

11/16/92—MEMORANDUM by claimant Jerome B Grubart Inc in support of motion to dismiss count I of plaintiff's complaint.

11/16/92—APPENDIX filed by claimant Jerome B Grubart Inc to memorandum in support of motion to dismiss count I of plaintiff's complaint.

* * * *

12/1/92—MEMORANDUM by plaintiffs Great Lakes Dredge & Dock Company in opposition to Bally Manufacturing's petition to intervene; Certificate of service.

12/2/92—RULE 24 PETITION by petitioner Bally Mfg Corp to intervene.

12/2/92—MEMORANDUM by petitioner Bally Mfg Corp of law in support of its Rule 24 petition to intervene.

* * * *

12/2/92—ORAL MOTION by Bally Mfg Corp to join City of Chicago's motion to dismiss.

12/2/92—MINUTE ORDER of 12/2/92 by Hon. Charles P. Kocoras. Granting Bally Manufacturing Corp's oral motion to join City of Chicago's motion to dismiss. Denying Bally's petition to intervene as moot.

* * * *

12/7/92—MEMORANDUM by plaintiff Great Lakes Dredge & Dock Co in opposition to the motions to dismiss.

12/7/92—APPENDIX of exhibits filed by plaintiff Great Lakes Dredge & Dock Co.

12/14/92—REPLY MEMORANDUM by defendant in support of its motion to dismiss.

* * * *

12/15/92—REPLY MEMORANDUM by claimant Jerome B Grubart Inc in support of motion to dismiss count I of plaintiff's complaint.

* * * *

12/16/92—AFFIDAVIT of Richard H. Heiss as supplement to reply memorandum in support of motion to dismiss count I of plaintiff's complaint.

12/17/92—MOTION by claimant Jerome B Grubart Inc to strike the exhibits and affidavits.

* * * *

12/22/92—MEMORANDUM by plaintiff Great Lakes Dredge & Dock Co of law in opposition to Grubart's motion to strike.

* * * *

2/10/93—MINUTE ORDER of 2/10/93 by Hon. Charles P. Kocoras: Ruling on pending motion to strike the exhibits and affidavits, motion to dismiss the complaint, motion to dismiss count I of plaintiff's complaint set for 2/18/93 at 9:30 a.m.

2/18/93—MEMORANDUM OPINION.

2/18/93—ENTERED JUDGMENT.

2/18/93—ORAL MOTION by plaintiff to extend the stay.

2/18/93—MINUTE ORDER of 2/18/93 by Hon. Charles P. Kocoras: Ruling held. Enter memorandum opinion: Granting pending motions to dismiss. All other pending motions, if any, are hereby moot. Granting Great Lakes Dredge & Dock Co.'s oral motion to extend the stay. The court hereby extends the present stay until 02/25/93.

2/19/93—EMERGENCY NOTICE OF APPEAL by plaintiff Great Lakes Dredge from order, from judgment entered, from motion minute order.

2/19/93—JURISDICTIONAL STATEMENT by plaintiff Great Lakes Dredge regarding appeal.

* * * *

3/8/93—TRANSCRIPT of proceedings for the following date(s): 10/08/92, 11/03/92, 11/05/92, 12/02/92, 12/17/92 and 02/18/93 Before Honorable Charles P. Kocoras.

* * * *

CITY OF CHICAGO
DEPARTMENT OF PUBLIC WORKS
BUREAU OF ENGINEERING

CONDITION REPORT OF PROTECTIVE TIMBER PILE CLUSTERS AT VARIOUS BRIDGES

Condition Report on Existing Conditions of Protective Timber Pile Clusters and Recommendations of Required Repairs for Various Bridges.

Prepared by:

/s/ FRANK OCIEPKA
Frank Ociepka
Mgr. Bridge Operations and Maintenance

Approved by:

/s/ TED KACZKOWSKI
Ted Kaczkowski
Chief Bridge Engineer

CONTENTS

INTRODUCTION

The purpose of this report is to describe the extent of deterioration of the protective timber pile clusters at various bridges and to recommend remedial measures to correct the hazardous conditions created by this deterioration. Also, included is a preliminary cost estimate for replacing these clusters to restore the bridges to a safe condition.

EXISTING CONDITIONS

Protective timber pile clusters, also known as timber dolphins, are installed in the waterways adjacent to bridges to protect them from damage from passing vessels which may drift from the boundaries of the navigational channel.

A survey was recently conducted to determine the conditions of the protective timber pile clusters of the drawbridges on the navigable waterways. As a result of this

survey it was determined that the serviceable life of various clusters has been exhausted and are in need of immediate replacement in order to protect the bridges from potential damage from vessel collisions.

RECOMMENDATIONS

It is recommended that one or more new protective clusters be installed at the following drawbridges:

1. Chicago Avenue Drawbridge over the North Branch of the Chicago River.
2. Kinzie Street Drawbridge over the North Branch of the Chicago River.
3. Madison Street Drawbridge over the South Branch of the Chicago River.
4. Washington Street Drawbridge over the South Branch of the Chicago River.
5. Cermak Road Drawbridge over the South Branch of the Chicago River.

COST ESTIMATE

It is estimated that 14 deteriorated protective clusters and appurtenances must be removed and replaced at a total estimated cost of $750,000.

EXECUTION OF CITY/STATE PROJECT AGREEMENT FOR REPLACEMENT OF PILE CLUSTERS AT VARIOUS BRIDGES THROUGHOUT CITY

* * * *

Be It Ordained by the City Council of the City of Chicago:

SECTION 1. The Mayor is authorized to execute, the City Clerk to attest to and the Commissioner of Public Works to approve, subject to the review of the Corporation Counsel as to form and legality, a project agreement with the State of Illinois providing for the replacement of pile clusters at various bridges throughout the City, said agreement to be substantially in the following form:

[City/State Project Agreement immediately follows Section 3 of this ordinance.]

SECTION 2. That the City Clerk is hereby directed to transmit two (2) certified copies of this ordinance to the Division of Highways, Department of Transportation of the State of Illinois through the District Engineer of District I of said Division of Highways.

SECTION 3. That this ordinance shall be in full force and effect from and after its passage.

City/State Project Agreement attached to this ordinance reads as follows:

City/State Project Agreement.

Replacement Of Pile Clusters
At Various Bridges Throughout The City.

City Section No.: _____
State Job No.: _____
D.P.W. Job No.: _____

This Agreement, entered into this ___ day of _____, 19___ by and between the State of Illinois, acting through its Department of Transportation, hereinafter called the "State", and the City of Chicago, acting through its Department of Public Works, hereinafter called the "City".

Witnesseth:

Whereas, The State and the City, in the interest of the safe and efficient movement of vehicular and pedestrian traffic, find it necessary to proceed with the replacement of pile clusters at various bridges throughout the City, hereinafter referred to as the "Project" and described in numbered paragraph 8 of this Agreement; and

Whereas, The Department of Transportation of the State of Illinois, under Chapter 121, Article 4-409 of the Illinois Revised Statutes, as currently in effect, may enter into a written contract with any other highway authority for the jurisdiction, maintenance, administration, engineering or improvement of any highway or portion thereof; and

Whereas, On June 30, 1989, the State and the City entered into a Memorandum of Understanding regarding the funding of a Five-Year Road Program in Chicago, concluding with the end of State Fiscal Year 1994, and the Section 3 line item of that Memorandum which provides $20,000,000 for City bridge capital improvements to be obligated by the City is the basis for State funds provided under this Agreement; and

Whereas, The State and the City have concurred that the Project qualifies for the use of such funds.

The State Hereby Agrees:

1. To reimburse the City 100% of the costs incurred in connection with the contract construction, and

construction engineering/supervision of the Project, as hereinafter provided in numbered paragraph 9, upon receipt of progressive billings supported by documentation as required by the State.

The City Hereby Agrees:

2. Upon approval by the State, to let and award a contract for the Project, to provide and/or cause to be provided all construction engineering/supervision, in accordance with established procedures of the City and State.

3. To finance the work pending progressive reimbursement by the State of the costs involved, to appropriate such funds as are necessary therefore [sic], and to prepare a complete and accurate breakdown of the costs of the Project.

4. To comply with all applicable Executive Orders and legislation pursuant to the Equal Employment Opportunity and Nondiscrimination Regulations as may be required by the State and under federal law.

5. To retain all Project records and to make them available for audit by State auditors during the Project construction, and for a period of three (3) years after final acceptance of the Project by the parties hereto.

The Parties Hereto Mutually Agree:

6. That, upon completion of the improvement, the City and the State will maintain or cause to be maintained, in a satisfactory manner, their respective portions of the improvement in accordance with established jurisdictional authority.

7. That prior to initiation of work to be performed hereunder, the disposition of encroachments will be cooperatively determined by representatives of the City and State.

8. That said Project generally consists of the replacement of pile clusters at various bridges within the City, in order to provide the structures with increased protection from the possibility of collision by marine traffic. Deteriorated timber pile clusters will be removed and replaced with new steel pipe pile clusters. All other appurtenances necessary to complete the Project will also be provided.

9. That the estimated costs of the Project covered and described by this Agreement are:

Contract Construction	$680,000
Construction Engineering/Supervision	70,000
TOTAL:	$750,000

and that 100% of the actual final costs will be paid by the State up to a maximum of $750,000, with any cost in excess of that amount to be paid by the City, or otherwise provided by amendment to this Agreement.

10. That the City shall be responsible for 100% of the cost of any work not eligible for State participation.

11. That the Commissioner of Public Works is authorized to execute revisions to this Agreement relative to budgetary items, upon approval by Illinois Department of Transportation, as long as such revisions do not increase the total cost of the Project ($750,000) as authorized by the City Council.

12. That this Agreement and the covenants contained herein shall be void ab initio in the event the construction work contemplated herein is not completed by June 1, 1993.

13. That all prior Agreements, or portions thereof, between the City and the State which refer to the construction of this Project are superseded by this Agreement.

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

The Local Agency certifies to the best of its knowledge and belief its officials:*

(1) are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from covered transactions by any federal department or agency;

(2) have not within a three-year period preceding this Agreement been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public (federal, state or local) transaction or contract under a public transaction: violation of federal or State anti-trust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

* The Local Agency for purpose of this certification is defined as the Department of Public Works of the City of Chicago. Officials for the purpose of this certification are the Mayor of the City of Chicago, the Commissioner of the Department of Public Works, the Purchasing Agent and the Comptroller of the City of Chicago.

(3) are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state or local) with commission of any of the offenses enumerated in item (2) of this certification;

(4) have not within a three-year period preceding this Agreement had one or more public transactions (federal, state of local) terminated for cause or default;

(5) have not been barred from signing this Agreement as a result of a violation of Sections 33E-3 and 33E-4 of the Criminal Code of 1961 (Chapter 38 of the Illinois Revised Statutes);

(6) are not in default on an educational loan as provided in Public Act 85-827; and

(7) have not been barred from signing this Agreement as a result of a violation of Chapter 127, Section 10.2 of the Illinois Revised Statutes.

In Witness Whereof, The City and State have caused this Agreement to be executed by their respective officials and attested to on the date hereinafter listed.

[Signature lines omitted]

VARIOUS DRAWBRIDGES
NEW PILE CLUSTERS
D.P.W. PROJECT NO. E-0-469

CITY SECTION: 90-E0469-00-BR
JOB NO. C-88-025-90
STATE SECTION: 1990-078I

SPECIFICATIONS AND CONTRACT DOCUMENTS
NO. PE04699001

CITY OF CHICAGO
RICHARD M. DALEY
Mayor

Prepared by
DEPARTMENT OF PUBLIC WORKS
BUREAU OF ENGINEERING
DAVID S. WILLIAMS, JR.
Commissioner
Room 406, City Hall
Chicago, Illinois 60602
LOUIS KONCZA
City Engineer

Issued by
DEPARTMENT OF PURCHASES,
CONTRACTS AND SUPPLIES
ALEXANDER GRZYB
Acting Purchasing Agent
October 1990

Bids To Be Executed In Triplicate
All Signatures To Be
Sworn To Before A Notary Public

* * * *

REQUIREMENTS FOR BIDDING AND INSTRUCTIONS FOR BIDDERS

CONTRACT FOR WORK

* * * *

3. EXAMINATION BY BIDDER

The bidder shall, before submitting his bid, carefully examine the proposal, plans, specifications, contract documents and bonds. He shall inspect in detail the site of the proposed work and familiarize himself with all the local conditions affecting the contract and the detailed requirements of construction. If his bid is accepted, he will be responsible for all errors in his proposal resulting from his failure or neglect to comply with these instructions. The City will, in no case, be responsible for any change in anticipated profits resulting from such failure or neglect.

Unless otherwise provided in Special Conditions, when the plans or specifications include information pertaining to subsurface exploration, borings, test pits, and other preliminary investigation, such information represents only the opinion of the City as to the location, character, or quantity of the materials encountered and is only included for the convenience of the bidder. The City assumes no responsibility whatever in respect to the sufficiency or accuracy of the information, and there is no guaranty, either expressed or implied, that the conditions indicated are representative of those existing throughout the work, or that unanticipated developments may not occur.

* * * *

GENERAL CONDITIONS

* * * *

2. INDEMNITY

Contractor shall indemnify, keep and save harmless the City, its agents, officials and employees, against all injuries, deaths, loss, damages, claims, patent claims, suits, liabilities, judgments, costs and expenses, which may in anywise accrue against the City in consequence of the granting of this contract or which may in any wise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence or omission of the Contractor or his employees, of the subcontractor or his employees, if any, and the Contractor shall, at his own expense, appear, defend and pay all charges of attorneys and all costs and other expenses arising therefrom or incurred in connection therewith, and, if any judgment shall be rendered against the City in any such action, the Contractor shall, at his own expense, satisfy and discharge the same. Contractor expressly understands and agrees that any performance bond or insurance protection required by this contract, or otherwise provided by Contractor, shall in no way limit the responsibility to indemnify, keep and save harmless and defend the City as herein provided.

* * * *

SPECIAL CONDITIONS FOR PUBLIC WORKS CONSTRUCTION

* * * *

101.2. Intent of Plans and Specifications

The intent of the plans and specifications is to prescribe an outline of work which the Contractor undertakes to do in full compliance with the Contract. The Contractor shall do all work as provided in the Contract and such additional, extra, collateral and incidental work as may be necessary to complete the work in an acceptable manner. He shall furnish all required materials, equipment,

tools, labor, temporary light and power, shop plans, working drawings, and incidentals, unless otherwise provided in the Contract, and shall include the cost of these items in the contract unit and lump sum prices for the several units of work.

The specifications and plans are not intended to cover every detail of materials, parts, or construction. The Contractor shall furnish all materials, parts, and labor necessary to fully complete the entire work, whether or not said details are particularly shown or specified, all at no additional cost to the City.

* * * *

Before the Contractor physically begins the contract work, he shall check the City's Plans and Specifications. Should any errors, discrepancies or omissions be found in these Plans and Specifications or any discrepancy found between the Plans and the physical conditions at the site or in any subsequent drawings that may be provided thereafter, the Contractor shall notify the Commissioner, in writing, immediately. Any work done after such discovery, unless authorized by the Commissioner, will be done at the Contractor's expense. All work shall conform to the checked and corrected Plans and Specifications. The Contractor will not be allowed to take advantage of any error, omission or discrepancy in the Contract.

* * * *

101.7. Work by Contractor's Organization

Except as hereinafter specified, the Contractor shall perform with his own organization and forces not less than 25% of the total amount of work under this Contract which is performed at the site, computed on the basis of cost. The Contractor shall require each subcontractor to familiarize himself with all provisions of the Contract Documents which may affect his work.

Whenever the State of Illinois Department of Transportation, the Federal Highway Administration, or the Fed-

eral Aviation Administration supplies any of the funds for the work under this Contract, the amount of work by the Contractor's organization shall be as specified in the applicable sections of the Standard Specifications for Road and Bridge Construction of the Illinois Department of Transportation, Form FHWA 1273 of the Federal Highway Administration or the Standards for Specifying Construction of Airports of the Federal Aviation Administration, as the case may be.

* * * *

103.4. Plant, Procedure, Methods and Equipment

The Contractor shall determine the methods to be employed, the procedure to be followed, the equipment, plant, falsework, shoring, bracing and other temporary structures and equipment to be used on the work under this Contract, subject to the requirements of the Contract Documents and to the approval of the Commissioner. Only adequate and safe procedure, methods, structures and equipment shall be used.

The Contractor shall submit to the Commissioner for approval the order of procedure he proposes to follow in constructing the work and such procedure shall include the construction schedule.

Work shall be begun only after the Contractor's proposed order of procedure in performing the work, the construction schedule and the methods, structures and equipment to be employed by him thereon shall have been submitted to and approved by the Commissioner in writing. It is understood by the Contractor that a reasonable amount of time will be required by the Commissioner for the examination of said procedure and construction schedule.

As work progresses, changes or modifications in such procedure and construction schedule, or in such methods, structures and equipment may be required by the Commissioner. In such event, upon notice from the Commissioner to the Contractor, further work shall be performed only in accordance with such changed or modified procedure and construction schedule, and such changed or modified methods, structures and equipment, as the case may be, as shall have been submitted to and approved by the Commissioner in writing.

The Commissioner may disapprove and reject or require modification of any proposed or previously approved order of procedure, method, structure or equipment, which he considers to be unsafe for the work hereunder, or for other work being carried on in the vicinity, or for other structures, or for the public, or for workmen, engineers and inspectors employed thereon, or that in the opinion of the Commissioner will result in undesirable settlement of the ground, or that will not provide for the completion of the work within the period of time specified in the section "Time of Completion" of the Proposal, or that is contrary to any other requirement of this contract.

It is expressly agreed, however, that the acceptance or approval of any order of procedure, method, structure, or equipment submitted or employed by the Contractor shall not in any manner relieve the Contractor of responsibility for the safety, maintenance, and repairs of any structure or work, or for the construction, maintenance and safety of the work hereunder, or from any liability whatsoever on account of any procedure or method employed by the Contractor, or due to any failure or movement of any structure or equipment furnished by him. When constructed, even though in accordance with the approval of the Commissioner, should any structure or equipment installed hereunder afterwards prove insufficient in strength or fail in any manner whatsoever, such insufficiency or failure shall in no way form the basis of any claim for extra compensation for delay, or for damages or expenses caused by such insufficiency or failure, or for an extension of time for completion of this contract, or for material, labor or equipment required for repairing or rebuilding such structure or equipment or for re-

pairing or replacing any other work that may have been damaged by the movement or insufficiency or failure of any such structure or equipment, respectively.

* * * *

108.1. Protection of Existing Structures and Property

The Contractor shall avoid damage, as a result of his operations, to trees, plant life, existing sidewalks, curbs, streets, alleys, pavements, utilities, adjoining property, the work of other contractors, and the property of the City and others and he shall at his own expense repair any damage thereto caused by his operations.

* * * *

The Contractor shall familiarize himself with the requirements of local and state laws applicable to underpinning, shoring and other work affecting adjoining property, and wherever required by law the Contractor shall shoreup, brace, underpin, secure and protect as may be necessary all foundations and other parts of existing structures adjacent to, adjoining, and in the vicinity of the site, which may be in any way affected by the excavations or other operations connected with the work to be performed under this contract. The Contractor shall be responsible for the giving of any and all required notices to any adjacent or adjoining property owner or other party and such notice or notices shall be served in sufficient time as not to delay the progress of the work under this contract. The Contractor shall indemnify, save and keep the City harmless from any damages on account of settlements or the loss of laterlal [sic] support of adjacent or adjoining property and from all loss or expense and all damages for which the City may become liable in consequence of such injury or damage to adjacent and adjoining structures and their premises.

The provisions of the foregoing paragraph shall be construed to include also and apply to any liabilities and duties placed upon the City of Chicago as owner or occupant of the property on which the improvements provided for herein are to be constructed, by the provisions of an Act entitled "An Act to prescribe the duty of an owner or occupant of lands upon which excavations are made in reference to the furnishing of lateral and subjacent support to adjoining lands and structures thereon." See Chap. 70, Par. 10, Illinois Revised Statutes 1976.

The Contractor shall inform himself of the locations of all utilities in the vicinity of the site of the work and shall take suitable care to protect and prevent damage to such utilities from his operations under this contract. When performing work adjacent to existing sewers, drains, water and gas lines, electric or telephone or telegraph conduits or cables, poles lines or poles, or other utility equipment or structures, which are located outside of the neat lines of the excavations to be made or of the structures to be constructed under this contract and which are to remain in operation, the Contractor shall maintain such utility equipment and structures in place at his own expense and shall co-operate with the City department, utility company or other party owning or operating such utility equipment or structures in the maintenance thereof. The Contractor shall be responsible for and shall repair all damage to any such utility equipment or structures caused by his acts, whether negligent or otherwise, or his omission to act, whether negligent or otherwise, and shall leave such utility equipment or structure in as good condition as they were in prior to the commencement of his operations under this contract, however, it is hereby agreed that any such utility equipment or structures damaged as a result of any act, or omission to act, of the Contractor may, at the option of the City department, utility company or other party owning or operating such utility equipment or structures damaged, be repaired by such City department, utility company, or other party and in such event the cost of such repairs shall be borne by the Contractor.

* * * *

SPECIAL CONDITIONS FOR VARIOUS DRAWBRIDGES NEW PILE CLUSTERS D.P.W. PROJECT NO. E-0-469

201. STANDARD SPECIFICATIONS

The "Standard Specifications" designated as a component part of the Contract Documents on page R-3 of Requirements for Bidding and Instructions to Bidders means the Standard Specifications for Road and Bridge Construction Issued by the Department of Transportation of the State of Illinois, dated July 1, 1988, together with additions and revisions thereto issued by said Department of Transportation as supplemental specifications and special provisions, in effect on the date of advertisement for bids.

* * * *

204. REVISION TO STATE OF ILLINOIS STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION

Page 13, Section 103.02, Award of Contract.—Revised "45 calendar days" in the first and second paragraphs to read "60 calendar days".

205. TERMS

Wherever, in the Contract Documents, the following terms, or pronouns in place of them, or abbreviations, are used, the intent and meaning shall be interpreted as follows:

"Commissioner" means the Commissioner of the Department of Public Works, City of Chicago.

"A.S.T.M." means American Society for Testing and Materials.

"A.E.D." means Associated Equipment Distributors.

"A.A.S.H.T.O." means American Association of State Highway and Transportation Officials.

"C.C.D." means Chicago City Datum.

"City" means City of Chicago.

"Department" means City of Chicago or Department of Public Works.

"FS" means Federal Specification.

"IDOT" means Illinois Department of Transportation.

"SSPC" means Steel Structures Painting Council.

* * * *

209. PROVISIONS RELATING TO RIVER TRAFFIC

The Contractor's attention is directed to the fact that the Branches of the Chicago River involved are navigable streams. As such, the bridges involved herein must be open to masted vessels at any time on signal, except at certain hours of the day, as established by the City ordinance.

During the execution of this contract, marine regulations shall be complied with in every way, so that river traffic may be protected and any river obstruction avoided. In the event the Contractor finds it necessary to obstruct the river at any time, he should so advise the Commissioner, through the office of the Chief Bridge Engineer, who will make the necessary inquiries of the proper waterway officials so that the Contractor can schedule his work without interfering with the movement of vessels.

The Contractor shall comply with the directions of the Coast Guard and schedule his operations accordingly. No separate payment will be made for work or expenses incurred by compliance with this provision. Such cost will be deemed to be included in the contract prices.

* * * *

DETAIL SPECIFICATIONS

SCOPE OF WORK

The work under this contract involves the removal of various timber pile clusters and appurtenances plus their bindings and their replacement by 14 new 37-pile timber clusters at the following Drawbridges: Chicago Avenue over the North Branch of the Chicago River, Kinzie Street over the North Branch of the Chicago River, Cermak Road over the South Branch of the Chicago River, Washington Street over the South Branch of the Chicago River, and Madison Street over the South Branch of the Chicago River.

Attached sketch No. S-1 shows a typical arrangement of a 37 pile cluster. Attached sketches V-1 thru V-5 explains [sic] the existing pile clusters to be removed and the locations of the new clusters to be installed.

The contractor bidding this project shall have previous experience in pile-driving and related operations and may be required to submit evidence of the same in writing, at the option of the Commissioner.

The bidder is advised to visit and examine each site so that he will have a clear understanding of the requirements. No reimbursement will be made by the City of Chicago for any cost sustained in making such examinations.

For the purpose of this agreement, it will be necessary that the Contractor suppiy all labor and equipment to perform the work outlined in these specifications. Such equipment shall include barges, cranes, tugs and all hand and other tools as the work requires.

* * * *

CONSTRUCTION METHODS: After unwrapping, the existing piles shall be pulled one at a time with all necessary precautions taken to prevent breaking or splitting, with a crane employing a chain or heavy duty cable choker which has been slipped over the pile and lowered to a point well below the waterline. However, the use a clam bucket will be permitted with the approval of the Commissioner.

When new or existing pilings are being withdrawn, should breakage of any pile or pilings occur above the bottom of the river (mud line), the contractor shall remove any such broken pile or piling. In the event such pile or piles shall break at or below such mud line, the procedure to be followed and the determination of removal of the remaining portion of the pile or piles shall be at the direction of the Commissioner.

Upon completion of pulling, all piles together will [sic] all discarded appurtenances and debris, shall become the Contractor's responsibility and shall be removed from the site and properly disposed of. All dispositions shall be in conformity with the rules and regulations of the Illinois Environmental Protection Agency and of the United States Environmental Protection Agency.

The Contractor is advised that the passage of vessels has first priority and that no payment will be made for loss of time due to such passages. By inquiry from the City the contractor can determine in advance when these passages will occur, so that he may schedule his work accordingly.

The new pile clusters shall consist of thirty-seven (37) piles each. After each pile is driven into place, the new pile shall be tied off to the preceding pile by means of

a chain or cable tacked across each of the heads, in such a manner that conformity with the specified pattern as noted on Sketch S-1 can be observed.

The elevation of the new clusters shall be similar to other clusters at the particular location. All piles in any given cluster shall have the same approximate elevation and no pile in the given cluster shall differ in elevation from any other pile in the cluster by more than three (3) inches. If this requirement is not met, the Contractor will be required to trim the piles with a chain saw before the work will be accepted.

The Contractor shall not drive the piles at any other location than that specified by the City. The position of the piles shall not be changed to any degree, as even slight position changes may cause serious damage to various underground cables and structures. Should the contractor damage any of these cables or structures through carelessness or improper positioning he will be obliged to repair such damages and replace such materials at his own expense.

BASIS OF PAYMENT: This work will be paid for at the contract unit price each for Pile Cluster which price shall be payment in full for removal and disposal of material from existing clusters and for the new 37 pile clusters installed as specified herein.

* * * *

(Letterhead Of)

ILLINOIS DEPARTMENT OF TRANSPORTATION
Division of Highways/District 1
201 West Center Court/Schaumburg, Illinois/60196-1096

LOCAL ROADS AND STREERS [sic]
CITY
CHICAGO
Section: 90-E0469-00-BR
New Pile Clusters
Memorandum of Understanding Project (M.O.U. 20)

January 25, 1991

Mr. Louis Koncza
Chief Engineer
Bureau of Engineering
320 North Clark Street
Chicago IL 60610

Dear Sir:

The bids received for the January 15, 1991 letting have been evaluated and are considered acceptable for proceeding with an award of the above project. We hereby concur in the award of the contract to Great Lakes Dredge and Dock Company for the sum of $335,640.00.

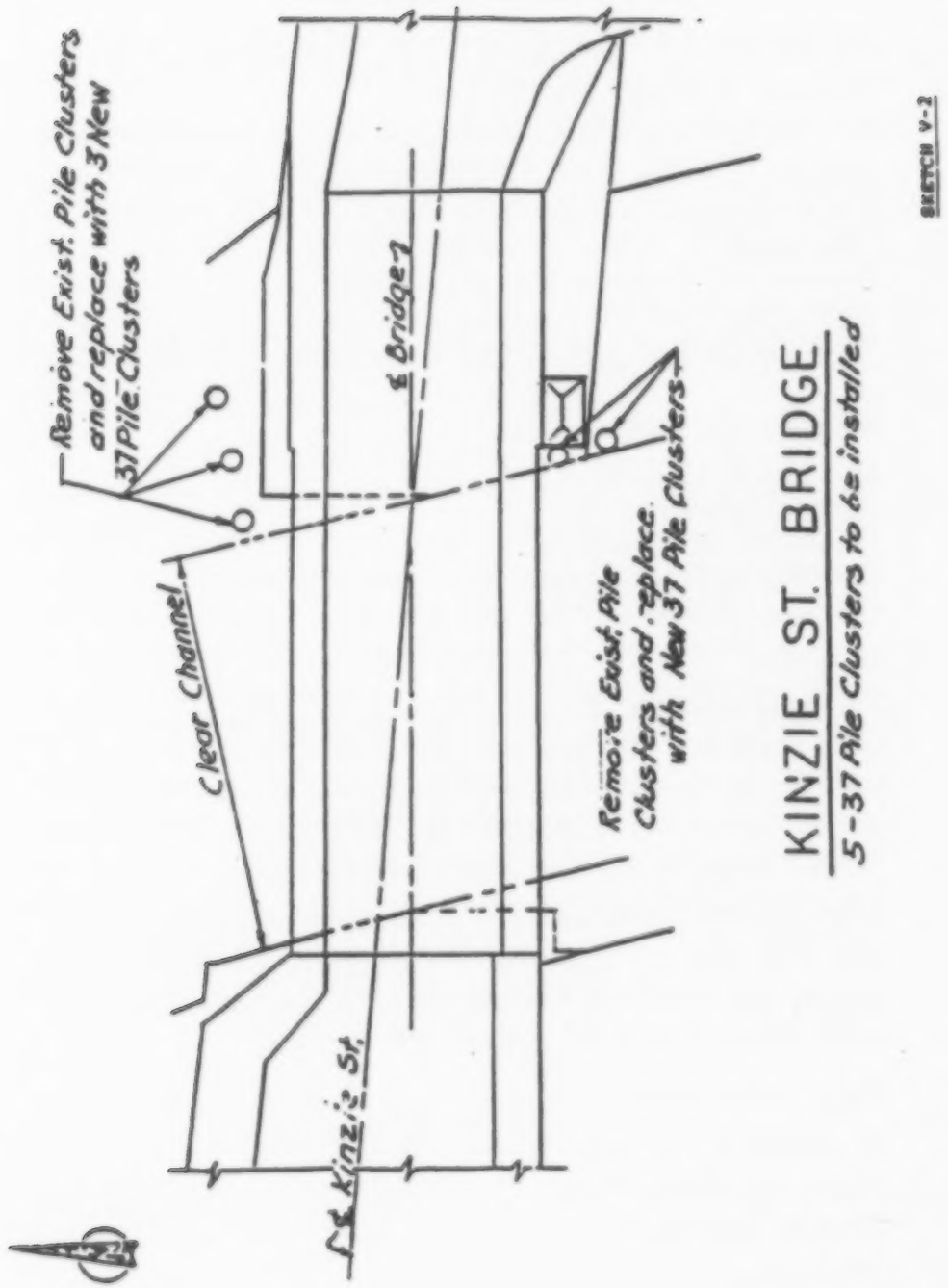
Since this is a Memorandum of Understanding funded project only four (4) copies of the complete Contract Documents, the Executed Contractor's Performance Bond and Inter-Office Memo of Award are needed.

Very truly yours,

/s/ JAMES C. SLIFER
James C. Slifer, P.E.
District Engineer

OYN/rk

cc: William T. Sunley w/encl.
Alexander Grzyb



[Filed October 6, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	IN ADMIRALTY
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff,	No. 92 C 6754
v.	JUDGE KOCORAS
CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	

COMPLAINT

Great Lakes Dredge & Dock Company ("Great Lakes"), by its attorneys McDermott, Will & Emery and Winston & Strawn, states its complaint for exoneration from or limitation of liability, and for other relief, as follows:

1. This is an admiralty and maritime claim within the meaning of Federal Rule of Civil Procedure 9(h) and Supplemental Admiralty Rules A and F for exoneration from or limitation of liability and for other relief. This Court has admiralty jurisdiction pursuant to 28 U.S.C. § 1333 and the Admiralty Extension Act, 46 U.S.C. § 740.

2. Great Lakes is a New Jersey corporation and owns the forty-two foot launch M/V PEACH STATE (U.S. Coast Guard Certificate of Documentation No. 286011), and two barges known as BARGE NO. G.L. 136 (U.S. Coast Guard No. 253150) and BARGE NO. G.L. 150 (U.S. Coast Guard No. 263631). Great Lakes used due diligence to make these vessels seaworthy, and each was tight, staunch and strong, fully and properly manned, equipped and supplied, and in all respects seaworthy and fit for the service in which each was engaged. At all times material hereto, these vessels were on navigable waters within this judicial district.

3. In July and August, 1991 the M/V PEACH STATE towed the aforesaid barges on several occasions to various sites along the North and South Branches of the Chicago River, a navigable inland waterway within this Court's admiralty jurisdiction, ultimately to a point alongside the Kinzie Street Bridge in Chicago. During the last week of August and first three weeks of September, 1991, the barge crew removed old, deteriorating pile clusters and drove new pilings into the riverbed.

4. The new pilings were located in clusters next to the navigable channel, served as an aid to navigation and protected the bridge and bridgehouse from allision by mispiloted or distressed vessels straying from the navigable channel. Pile clusters are common to rivers and harbors, their construction and upkeep being traditional maritime activities.

5. Once the crew had completed driving pilings at the Kinzie Street Bridge location, which proceeded without incident and in a workmanlike manner, the M/V PEACH STATE towed both barges on or about September 23, 1991 to their berths at Great Lakes' South Chicago Yard

on the Calumet River, within this judicial district, terminating their voyage.

6. Unbeknownst to Great Lakes or its crew, the City of Chicago, an Illinois municipal corporation, owned and operated a tunnel system beneath the riverbed and in close proximity to the old and new pile clusters on the south side of the Kinzie Street Bridge. The City of Chicago never disclosed the existence of the tunnel to Great Lakes' personnel, either when it was soliciting bids or issuing specifications for the work or when it approved changed locations for the clusters which were warranted by field conditions.

7. On the morning of April 13, 1992, over six months after Great Lakes' vessels left the site, an eddy formed on the river surface a few feet from the location on the south side of the bridge where two new pile clusters had been driven.

8. The present opinion of representatives of the City of Chicago is that the eddy was caused by the river leaking into the tunnel through a breach of the tunnel wall, a breach which, on information and belief, the City of Chicago first knew about no later than January or February, 1992, and which worsened and eventually flooded the tunnel system, allegedly causing damage to individuals and businesses in or near the Chicago Loop.

9. Great Lakes has been sued by numerous parties who claim damages as a result of Great Lakes' alleged negligence in driving the pilings. A list of actions filed to date against Great Lakes is attached hereto as Exhibit A. These claims have been consolidated within the Circuit Court of Cook County, Illinois in the case entitled *In re Chicago Flood Litigation*, No. 92 L 5422. In that lawsuit, more than a score of named plaintiffs seek damages against

Great Lakes and the City of Chicago in excess of one million dollars, which claims far exceed the value of the M/V PEACH STATE, the two barges and their freight pending. Named plaintiffs also purport to represent a class of unnamed individuals and businesses which were damaged by the flood, and there may exist other possible claimants who have yet to assert claims against Great Lakes.

COUNT I
(For Exoneration from or Limitation of Liability)

10. Great Lakes incorporates paragraphs 1 through 9, inclusive, as though fully set forth herein.

11. The tunnel flood and all consequent property loss and damages were caused not by fault of the M/V PEACH STATE, BARGE NO. G.L. 136 or BARGE NO. G.L. 150, the respective officers or crew, or of any person for whose actions Great Lakes is responsible but, on the contrary, were caused solely and only as a result of the negligence of the City of Chicago and/or the negligence of other parties presently unknown, and neither Great Lakes nor its vessels nor crew are liable to any extent.

12. All losses and damages resulting from the flood occurred without fault on the part of Great Lakes and without privity or knowledge on Great Lakes' part.

13. Great Lakes is entitled to exoneration from liability for all losses and damages occasioned and incurred by reason of the flood.

14. Alternatively, and without admitting liability, in the event that Great Lakes or the M/V PEACH STATE or BARGE NO. G.L. 136 or BARGE NO. G.L. 150 should be held responsible to any party, Great Lakes is entitled to

the benefit of the limitation of liability provided in title 46, section 183 *et seq.*, of the United States Code and all laws supplementary thereto and amendatory thereof.

15. At the termination of the aforesaid voyage, the value of the M/V PEACH STATE did not exceed the sum of $35,000 dollars; the value of BARGE NO. G.L. 136 did not exceed the sum of $223,300 dollars; and the value of BARGE NO. G.L. 150 did not exceed the sum of $40,000 dollars.

16. Great Lakes was to be paid the total of $335,640 by the City of Chicago for work on pile clusters at five bridge sites along the Chicago River, including the Kinzie Street Bridge location, but to date Great Lakes has been paid only $281,712.45.

17. Great Lakes has sought leave to file an *ad interim* stipulation in the appropriate form, with an approved corporate surety, for the payment into Court of the amount of Great Lakes' interest in the M/V PEACH STATE, BARGE NO. G.L. 136 and BARGE NO. G.L. 150 and their pending freight, together with interest at the rate of six percent per annum from the date of said stipulation, and $250 for costs. In addition, Great Lakes is prepared to stipulate for any amount in excess of this *ad interim* stipulation as determined by this Court to be necessary to reflect the value of its vessels and pending freight.

WHEREFORE, Great Lakes Dredge & Dock Company requests:

(1) that upon the filing of the stipulation herein described, this Court shall issue a notice to all persons, firms or corporations asserting claims for any and all losses, damages, injuries or destruction with respect to which Great Lakes seeks exoneration from or limitation of liability admonishing them to file their respective claims with

the Clerk of the Court and to serve on the attorneys for Great Lakes a copy thereof on or before the date specified in the notice;

(2) that upon the filing of the stipulation herein described, the Court shall issue an injunction restraining the commencement or prosecuion of any action or proceeding of any kind against Great Lakes, its crew or underwriters, or any of its property with respect to any claim for which Great Lakes seeks exoneration from or limitation of liability, including any claim arising out of or connected with any loss, damage, injuries or destruction resulting from the flood, including but not limited to the claims asserted against Great Lakes in the litigation set forth in Exhibit A hereto;

(3) that if any claimant who shall timely have filed a claim shall also file an exception controverting the value of the M/V PEACH STATE, BARGE NO. G.L. 136 and BARGE NO. G.L. 150 or their pending freight, this Court shall cause due appraisement to be had of the value of the said vessels and freight at the termination of their voyage and in which event this Court shall enter an order for the filing of an amended stipulation for the aggregate value, as so determined, of Great Lakes' interest in the said vessels and their pending freight;

(4) that this Court adjudge that Great Lakes and the M/V PEACH STATE, BARGE NO. G.L. 136 and BARGE NO. G.L. 150 are not liable to any extent whatsoever for any losses, damages, injuries or destruction or for any claim whatsoever occasioned or incurred as the result of the matters and happenings referred to in this complaint or, in the alternative, if the Court should adjudge that Great Lakes is liable in any amount whatsoever, that said liability may be limited to the value of Great Lakes' interest in the M/V PEACH STATE, BARGE NO. G.L. 136

and BARGE NO. G.L. 150 and their pending freight, and may be divided *pro rata* among such claimants; and that a judgment be entered discharging Great Lakes and the said vessels of and from any and all further liability and forever enjoining and prohibiting the filing or prosecution of any claims against Great Lakes or its property in consequence of or connected with the matters and happenings referred to in this complaint; and

(5) that Great Lakes have such other and further relief as justice may require.

Great Lakes states its claims against the City of Chicago as follows:

COUNT II
(For Indemnity from the City of Chicago)

18. Great Lakes incorporates paragraphs 1 through 17, inclusive, as though fully set forth herein.

19. The City of Chicago owed a duty to the bidding contractors, including Great Lakes, to disclose the existence of the tunnel near the Kinzie Street Bridge before it solicited bids from the various marine firms which submitted bids.

20. The City of Chicago failed to disclose the existence of the tunnel near the Kinzie Street Bridge to Great Lakes before it solicited bids.

21. If Great Lakes had known about the existence of the tunnel near the Kinzie Street Bridge, it would not have submitted the bid it did submit and would not have undertaken the pile driving work on the terms specified for the project by the City of Chicago.

22. The City of Chicago had a duty to disclose the existence of the tunnel to Great Lakes before any work actually was commenced at the Kinzie Street Bridge location and before the City of Chicago approved changed

locations warranted by field conditions for two of the pile clusters.

23. The City of Chicago failed to disclose the existence of the tunnel near the Kinzie Street Bridge to Great Lakes before the actual work was commenced or before it approved changed locations for two of the pile clusters.

24. The City of Chicago also owed a duty to maintain and repair the tunnel. The City of Chicago failed to maintain the tunnel and, although it learned of the breach in the tunnel wall no later than January or February, 1992, it failed to repair the tunnel.

25. If the pilings driven by Great Lakes are held to have played any role in the breach of the tunnel, then the City of Chicago's failure to disclose the existence of the tunnel near the Kinzie Street Bridge and failure to maintain and repair the tunnel were the sole proximate causes of the breach and any damages ensuing therefrom.

26. Based on the parties' relationship, the complete fault of the City of Chicago, including its failures to disclose the existence of the tunnel and maintain or repair it after it learned of the breach, and the lack of any fault on the part of Great Lakes, Great Lakes is entitled to be indemnified by the City of Chicago for any damages for which Great Lakes is held responsible, including its costs and attorneys' fees incurred in defending the various claims and prosecuting its claim for exoneration from liability.

27. Pursuant to Federal Rule of Civil Procedure 14(a), Great Lakes requests that judgment be entered in its favor and against the City of Chicago for the entire amount Great Lakes is found liable to pay any injured claimant herein.

28. Pursuant to Federal Rule of Civil Procedure 14(c), Great Lakes alternatively requests that any judgment in favor of any claimant be entered directly in favor of the injured claimant(s) and against the City of Chicago.

WHEREFORE, Great Lakes Dredge & Dock Company requests:

(1) that judgment be entered in its favor and against the City of Chicago for any amount Great Lakes is found liable to pay any injured claimant herein or, alternatively, that any judgment in favor of any claimant be entered directly in favor of the injured claimant(s) and against the City of Chicago;

(2) that Great Lakes be awarded its costs and attorneys' fees incurred in defending the claims filed herein, in the state court proceedings, and in prosecuting its claim for exoneration from liability; and

(3) that this Court award whatever other relief that justice may require.

COUNT III
(For Contribution from the City of Chicago)

29. Great Lakes incorporates paragraphs 1 through 28, inclusive, as though fully set forth herein.

30. If it is found that claimants sustained any loss or injury as may be proven by their claims herein, then such loss or injury was caused in whole or in part by the negligence of the City of Chicago in failing to disclose the existence of the tunnel, or in failing properly to maintain or repair the tunnel after it learned of the breach, or by some other failing of the City of Chicago not presently known to Great Lakes, and not by any fault, neglect or want of care on the part of Great Lakes.

31. If the Court finds fault attributable to Great Lakes and the City of Chicago, then Great Lakes requests that the Court determine the proportion of each party's relative fault to the totality of causation and award Great Lakes such proportionate contribution from the City of Chicago as the City of Chicago's *pro rata* share of such causation shall bear to the whole.

32. Pursuant to Federal Rule of Civil Procedure 14(a), Great Lakes requests that judgment be entered in its favor and against the City of Chicago for any amount Great Lakes is found liable to pay any injured claimant herein attributable to the negligence of the City of Chicago.

33. Pursuant to Federal Rule of Civil Procedure 14(c), Great Lakes alternatively requests that any judgment in favor of any claimant be entered directly in favor of the injured claimant(s) and against the City of Chicago for any damages attributable to the negligence of the City of Chicago.

WHEREFORE, Great Lakes Dredge & Dock Company requests:

(1) that judgment be entered in its favor and against the City of Chicago for any amount Great Lakes is found liable to pay any injured claimant herein attributable to the negligence of the City of Chicago or, alternatively, that any judgment in favor of any claimant be entered directly in favor of the injured claimant(s) and against the City of Chicago for any damages attributable to the negligence of the City of Chicago; and

(2) that this Court award to Great Lakes costs and whatever other relief justice may require.

GREAT LAKES DREDGE
& DOCK COMPANY

By: /s/ PAUL J. KOZACKY
One of its attorneys

Douglas Reimer
John T. Schriver
Paul J. Kozacky
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312/372-2000

Of counsel:

Duane M. Kelley
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312/558-5600

VERIFICATION

The undersigned certifies under penalty of perjury that he is authorized to sign this verification on behalf of Great Lakes Dredge & Dock Company, is personally knowledgeable about the matters set forth herein, and that the factual statements set forth in this complaint are true and correct, except as to such matters stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ DOUGLAS B. MACKIE
Douglas B. Mackie

EXHIBIT A

1. *G. P. Antons, Restaurant & Lounge, Merit Insurance Co., on behalf of themselves and all other persons and entities similarly situated, plaintiffs v. Great Lakes Dredge & Dock Co., City of Chicago, Metropolitan Water Reclamation District of Greater Chicago, Itel Corporation, Blackstone Dredging Partners L.P. and John Does, defendants,* No. 92 CH 03708 (Cook County, Illinois filed April 14, 1992).

2. *Dr. Richard Cook, plaintiff v. City of Chicago, Great Lakes Dredge & Dock Company, defendants,* No. 92 CH 3812 (Cook County, Illinois filed April 16, 1992).

3. *Tiffany Wilson, LePecque and Jac-Lin, plaintiffs v. Great Lakes Dredge & Dock Company, City of Chicago, Metropolitan Water Reclamation District and John Does, defendants,* No. 92 Ch 3821 (Cook County, Illinois filed April 16, 1992).

4. *Merced E. Zuniga, plaintiff v. City of Chicago and Great Lakes Dredge & Dock Co., defendants,* No. 92 Ch 3882 (Cook County, Illinois filed April 22, 1992).

5. *Julie Mome, Inc., plaintiff v. Great Lakes Dredge & Dock Co., Great Lakes International, Inc., Itel Corporation, Blackstone Dredging Partners L.P., City of Chicago and John Does, defendants,* Nos. 92 L 05422 & 92 Ch 4359 (Cook County, Illinois filed May 4, 1992).

6. *Robert Allen, Inc., M. J. Miller & Co., Inc., Edwin J. Mills and Capitol Snax, Inc., plaintiffs v. City of Chicago, Great Lakes Dredge & Dock Co., Dennis Sadowski, James McTigue, Louis Koncza, John LaPlante and Frank Ociepka, defendants,* No. 92 Ch 4337 (Cook County, Illinois filed May 1, 1992).

7. *Norman Berliant, plaintiff v. City of Chicago, Great Lakes Dredge & Dock Co. and Commonwealth Edison, defendants,* No. 92 Ch 4702 (Cook County, Illinois filed May, 1992).

8. *In re Chicago Flood Litigation (Hugh C. Michels & Co., Kanter & Mattenson, Ltd., Merit Insurance Co., Aera Crockett, M.J. Miller & Co., Inc., Edwin J. Mills, Capitol Snax, Inc., Dr. Richard Cook, Tiffany Wilson, Le Pecque Women's Apparel, Jac-Lin, Merced E. Zuniga, Dr. Donald L. Hohman, AVOCA, Inc., Julie Mome, Inc., Marilyn Hollander, Norman C. Berliant d/b/a Berliant Pharmacy, Fish Port, Inc., Fisherman's Paradise, Inc. d/b/a Solomon's Fishery, Hedlund Corporation, Hoe Kow Chinese Restaurant, Ltd., Oriental Electronics, Inc., R & L Fashions, Inc. d/b/a The Jewel Box, Randolph Flower Shop, Inc., Soul by the Pound, Inc., Royal Redemption Center, Inc. d/b/a State Pawners & Jewelers, Young Sik Jong d/b/a Harry's Sandwich Shop, Bart's Bar & Grill, Ronald P. Evans, G.P. Antons, Restaurant & Lounge, Robert Allen, Inc., plaintiffs v. Great Lakes Dredge & Dock Company, City of Chicago, Great Lakes Dredge & Dock Corporation, Great Lakes International, Inc., Itel Corporation, Blackstone Dredging Partners, defendants*), No. 92 L 5422 (Cook County, Illinois filed June 1, 1992).

9. *Bart's Bar & Grill, Inc., on behalf of themselves and all other persons and entities similarly situated, plaintiffs v. Great Lakes Dredge & Dock Company, City of Chicago, Mary Roes and John Does, defendants,* No. 92 Ch 5506 (Cook County, Illinois filed June 9, 1992).

10. *The Options Clearing Corporation, plaintiff v. The City of Chicago, a Municipal Corp. and Great Lakes Dredge & Dock Company, defendants,* No. 92 M1 020188 (Cook County, Illinois filed August 14, 1992).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff, v. CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	IN ADMIRALTY No. 92 C 6754 Hon. Charles P. Kocoras

AFFIDAVIT OF ROBERT W. BLOOM, JR.

Robert W. Bloom, Jr. certifies under penalty of perjury that the following statements are based on his personal knowledge and are true and correct:

1. I am Chief of the Bridge Branch, United States Coast Guard, Ninth District, based in Cleveland, Ohio and Bridge Program Manager. My responsibilities include authorizing repair and construction projects in navigable waterways in the Ninth District, which includes Illinois and the Great Lakes.

2. The Coast Guard's files contain several letters concerning a pile driving project in the North and South Branches of the Chicago River in 1990. In August, 1990 the City of Chicago submitted a request for approval of dolphin removal and replacement at five bridge sites in the Chicago River. The original plans called for steel pilings, and on September 7, 1990 I sent City Engineer Koncza a letter indicating that the City would need to undergo the permit application and review procedures in order to change the pilings from timber to steel. Sometime thereafter, the City revised its specifications and chose timber replacements.

3. Timber piles are kinder to vessels than steel piles. They are less likely to penetrate a vessel's hull than steel piles. Hull penetration can cause a vessel to sink. In addition, the timber dolphins also protect both the vessel and the bridge from each other. A vessel is less likely to suffer damage from a timber dolphin than from a concrete bridge abutment or its steel structure. The NOAA charts indicate a bascule bridge at Kinzie Street in Chicago, which means the bridge has to be raised and lowered to permit masted traffic to pass. Timber dolphins, which protect bascule bridges, also protect masted navigation.

4. The Cuyahoga River takes a sharp bend at its mouth on Lake Erie. The point around the bend is protected by a fendering system secured by pilings driven into the river bottom. Vessels, including barges, commonly use the structure to lay alongside and pivot about in order to make the turn. Vessels also use these particular structures to mark the navigable channel, the portion of a navigable waterway over a certain charted depth.

Further affiant sayeth not.

/s/ ROBERT W. BLOOM, JR.
Robert W. Bloom, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff, v. CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	IN ADMIRALTY No. 92 C 6754 Hon. Charles P. Kocoras

AFFIDAVIT OF LES J. FLETCHER

Les J. Fletcher certifies under penalty of perjury that the following statements are based on his own personal knowledge and are true and correct:

1. I was employed by Great Lakes Dredge & Dock Company ("Great Lakes") from April, 1953 to May, 1992. I began with Great Lakes as an apprentice to divers. In 1955 I was promoted to diver. In addition to working as a diver, I also worked in the Great Lakes yards and on work crews. In 1982 I became a full time foreman of pile driving crews.

2. I was the pile driving foreman for Great Lakes' pile driving project in July through September, 1991, which consisted of replacing 14 pile clusters at five different locations in the Chicago River, including a location near Kinzie Street.

3. The pile cluster replacement project started in the Chicago River at Cermak Road in July, 1991. The piles to be driven were transported from Great Lakes' yard near 92nd Street on the Calumet River to the work site by a towed barge. The piles pulled from the river were laid upon the same pile barge, to be taken away from the work site back to Great Lakes' yard for disposal.

4. While at the Cermak Road location, the tug PEACH STATE was needed to assist moving the pile driving and deck barges so that pleasure craft and commercial traffic could navigate the river. The PEACH STATE was also used every work day to bring the barges to the work site from their secured overnight locations. Following the removal of the old piles, two new pile clusters of 37 piles in each cluster were driven at the Cermak Road location.

5. Upon completion of the work at Cermak Road, the PEACH STATE towed the barges to the next project location at Washington Street. I and some other Great Lakes crew members were transported from the Cermak Road location to the Washington Street location on one of the barges.

6. At Washington Street, the PEACH STATE would move the barges from their secured overnight moorings to the work site each morning, and return the barges to their secured positions each night. One pile cluster was removed and one new 37 pile cluster was driven near Washington Street.

7. At the completion of the work at Washington Street, the barges were shifted with the help of the PEACH STATE to the Madison Street location, where there was a commuter boat dock. Work at the Madison Street location was delayed in the mornings due to the commuter boat's need to use the nearby dock for loading and unloading its passengers. Our work at Madison Street consisted of removing one existing pile cluster and driving one new 37 pile cluster. At the end of each work day at Madison Street, the PEACH STATE would tow the barges to their overnight moorings, and each morning the PEACH STATE would begin the day by bringing the barges to the work site.

8. Once the work at Madison Street was completed, the PEACH STATE towed the barges to Chicago Avenue, the next work site. When the barges were moved to Chicago Avenue, I and some other members of the crew were transported on one of the barges. At the Chicago Avenue location, 5 new 37 pile clusters were driven after the existing piles were removed. The work at Chicago Avenue required the PEACH STATE to move the barges to four different positions in order to drive the 5 pile clusters.

9. Once the five pile clusters were installed at Chicago Avenue, the barges were towed by the PEACH STATE to Kinzie Street. At the beginning and end of every day at the Kinzie Street location, the PEACH STATE would tow into position the Barge G.L. No. 150, which carried the new piles to be driven and on which the old piles were placed.

10. A total of five new 37 pile clusters were driven at Kinzie Street at two separate locations after all of the old pile clusters were pulled. At Kinzie Street, as at each of the other sites, the barge on which the piles were placed

was tied to the side of the barge on which the pile driving equipment was placed. This configuration resulted in one or both of the barges working in the navigable channel. While working at the Kinzie Street locations, the work was interrupted on several occasions in order to allow commercial traffic to pass. The pile barge would have to be moved out of the channel to allow commercial traffic sufficient room to navigate the river.

11. At the completion of the work at Kinzie Street, the two barges were towed back to Great Lakes' yards on the Calumet River. There the old piles on the barge G.L. 150 were removed for disposal.

FURTHER AFFIANT SAYETH NOT.

/s/ LESLIE J. FLETCHER
Les J. Fletcher

SUBSCRIBED AND SWORN TO
before me this 7th day
of December 1992.

/s/ DOLORES FISHER
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	)	
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff,	)	IN ADMIRALTY
v.	)	No. 92 C 6754
	)	Hon. Charles P. Kocoras
CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	)	

AFFIDAVIT OF GEORGE E. LEITHNER

George E. Leithner certifies under penalty of perjury that the following statements are based on his personal knowledge and are true and correct:

1. I have been a marine surveyor since 1948 and am president of the marine surveying firm Hunt, Leithner & Company, Inc. I graduated from the United States Merchant Marine Academy in Kings Point, Long Island, New York in 1944, sailed as a Third and Second Officer aboard various vessels, and further trained as a United States Naval Reserve Officer in Bayonne, New Jersey.

2. Attached hereto as Exhibit A is an enlargement from the National Ocean Service's chart for the Chicago River (19th ed. Jan. 12, 1991) which shows the bend in and the constriction of the river at Kinzie Street (which is circled on the chart). Companies such as Material Service Corporation, Cometco, and Morton Salt regularly employ barges for shipping cargo up and down the river past Kinzie Street. Several marine companies tow the barges, including Material Service Corporation, Spivey Marine Services, Ham Tug & Fleeting Service Co., Inc. and Illinois Marine Towing, Inc. The turn and narrowing at Kinzie Street make for some tricky navigation, especially when the barges are light or empty and ride higher in the water and, as a result, the tows are more susceptible to being affected by the wind.

3. Given the turn and reduced horizonal clearance at Kinzie Street (which is among the narrowest passages on the Chicago River), the concrete bridge abutments which support the bascule bridge and extend down into the water are a severe hazard to navigation. Allision with the concrete abutment, or any of the bridge's steel underwork and structure, could seriously damage a vessel, even causing a hull breach and possible sinking. To protect vessels from this serious risk, bridge owners customarily employ marine contractors to drive pile clusters sometimes referred to as "dolphins" around the abutments so a vessel will sheer off of the dolphin instead of hitting the bridge structure. Dolphins which serve this purpose are made of wood piles driven into the river bottom in a close, circular cluster wrapped by a chain and extending well above the river surface. These wooden pile clusters will give and absorb some of the force away from an allision, as opposed to steel dolphins which are as unkind to vessels as the steel and concrete bridge itself and are de-

signed only to protect the shore structure. The Kinzie Street dolphins are made of wood.

4. Barge tows, especially when light and subjected to wind, may make the turn at Kinzie Street by using the pilings as a fulcrum to turn. A tow boat pilot towing barges may deliberately land his tow against the pilings, and then maneuver the tow in such a manner as to pivot around the dolphin to align the tow with the channel. This maneuver sometimes is referred to as warping. Often, a pilot as a result of wind or current will have no alternative but to utilize the dolphin in this fashion.

5. On December 3, 1992 I boarded the tow boat M/V LORNA HACKWORTH which was making runs up and down the Chicago River. At approximately 0340 hours on December 4, the tow boat faced up to a tow consisting of two empty barges in tandem and proceeded south towards Wolf Point. As we passed Chicago Avenue, the tow inadvertently landed on a dolphin near Ohio Street and the captain pivoted the tow on the dolphin to correct his course. As we approached the Grand Avenue bridge, the retractable pilothouse was lowered in order to clear that bridge. (Tow boats navigating the Chicago River have retractable pilothouses in order to clear certain bridges.) Once the pilothouse was retracted, we could no longer see over the tow (obscuring the channel alignment beneath the next bridge at Kinzie Street). The Kinzie Street bridge is lower than the one at Grand Avenue, but it opened quickly enough so the tow was not required to stop. Had full stop been ordered to avoid alliding into a too-slow-to-open bridge, the tow would have gotten out of alignment and doubtlessly would have hit the Kinzie Street pilings on one or possibly both sides of the river.

6. I have had over three decades' experience conducting marine casualty investigations on behalf of both bridge interests and river towing operators, and in that connection have conducted numerous surveys of damage to vessels, bridges and dolphins. I have been involved with preparing specifications for dolphin repair and often have seen marine firms such as Great Lakes Dredge & Dock Company, Lakes & Rivers Contractors, Inc. or Thatcher Engineering, among others, repairing or driving new pilings by utilizing crane and spud barges in the navigable channel. Generally, dolphin repair and replacement of necessity requires the use of crane barges, spud barges and tow boats because land-based equipment normally cannot reach the spot in the river where the dolphins are to be driven. Dolphin repair and replacement is a traditional maritime activity undertaken by marine contracting firms. If the dolphins are not maintained, they themselves become a hazard to navigation. They need to be staunch and resilient in order to serve their intended purpose.

FURTHER AFFIANT SAYETH NOT.

/s/ G.E. LEITHNER
George E. Leithner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff,	IN ADMIRALTY
v.	No. 92 C 6754
CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	Hon. Charles P. Kocoras

AFFIDAVIT OF EDWARD POPELAS

Edward Popelas certifies under penalty of perjury that the following statements are based on his personal knowledge and are true and correct:

1. I have been registered with the U.S. Coast Guard as a captain since August, 1987. Most of my experience has been on the Calumet River, although I also have experience in piloting vessels on the Chicago River.

2. In September, 1991 I was hired on a day-to-day basis by Great Lakes Dredge & Dock Company ("Great Lakes") to captain and pilot the M/V PEACH STATE, a launch owned by Great Lakes.

3. On September 11, 1991 I piloted the M/V PEACH STATE from its moorings at the Ogden Slip on the Chicago River to a work site of Great Lakes near Kinzie Street in the North Branch of the Chicago River. A member of Great Lakes' crew unlashed Barge No. G.L. 150 (the barge which stowed and transported both new and old piles) from its moorings and I towed it with the PEACH STATE to a position alongside Barge No. G.L. 136 (the pile driving barge).

4. Barge No. G.L. 150 was lashed to the port side of Barge No. G.L. 136. I then piloted the PEACH STATE to a position astern of Barge No. G.L. 150, to which the PEACH STATE was tethered.

5. Beginning approximately 1245 hours, I unmoored the PEACH STATE and began towing both Barge Nos. G.L. 136 and G.L. 150, one at a time, from the north side of a Kinzie Street bridge to the south side. At the completion of this operation, I again lashed the PEACH STATE to Barge No. G.L. 150.

6. At approximately 1500 hours on September 11, 1991 I unmoored the PEACH STATE and towed Barge No. G.L. 150 from the Kinzie Street work site to its nightly storage mooring south of the railroad bridge several hundred yards south of the Kinzie Street bridge.

7. Once Barge No. G.L. 150 was securely moored, I piloted the PEACH STATE to the Ogden Slip where it was moored for the night.

8. The operation described above represents a typical day during the course of my employment by Great Lakes in September, 1991. Each day I would pilot the PEACH STATE from the Ogden Slip and tow Barge No. G.L. 150 from its moorings to the work site. Thereafter I would

standby, waiting to assist should either Barge need to be relocated to another work location or move to permit passage of other commercial river traffic. On several occasions, such assistance was required to move Barge No. G.L. 150 out of the channel to permit commercial traffic to pass.

9. Barges are "towed" by being pushed from astern. When empty of cargo, the barges are susceptible to being moved laterally by the wind. As a tug captain since 1987, I have personally observed occasions when a two-barge flotilla or oversized barge would deliberately lay up against the timber pile clusters or "dolphins" near bridges, either because the vessels had been pushed off course by wind or to assist the captain in turning the barges. The tug captain will turn one screw of his boat to reverse and the other to forward. The dolphins act as a fulcrum and this maneuver swings the barges in the direction necessary to navigate the river.

10. The dolphins are also used by pilots as points of reference similar to buoys to assist in determining the width of the channel and the best and most efficient course to steer.

Further affiant sayeth not.

/s/ EDWARD J. POPELAS
Edward Popelas

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	)	
GREAT LAKES DREDGE & DOCK COMPANY,	)	IN ADMIRALTY
Plaintiff,	)	No. 92 C 6754
v.	)	Hon. Charles P. Kocoras
CITY OF CHICAGO, an Illinois municipal corporation,	)	
Defendant.	)	

AFFIDAVIT OF BILL J. SPIVEY

Bill J. Spivey certifies under penalty of perjury that the following statements are based on his personal knowledge and are true and correct.

1. I own and operate Spivey Marine Services, located in Channahon, Illinois, which operates a tug boat service in and about the Chicago area, including the Chicago and Calumet Rivers. I have run Spivey Marine for over 15 years. I employ many captains to pilot tugs which tow and transport commercial traffic in and around Chicago's navigable waterways. I have been a licensed captain and have

personally piloted tug towing barges up the Calumet and Chicago Rivers.

2. When towing large barges or flotillas of more than one barge tethered together, the tug boat pushes the barges from astern. When towing barges empty of cargo in high winds, the barges may act as a sail and move laterally despite the best efforts of the pilot. Based upon my years of experience in the marine towing business, it is normal practice for tug pilots in such circumstances to use the timber pile clusters or dolphins placed near bridges as aids to realign the barges and point the barges in their intended direction. Without using the dolphins in this manner, barges could uncontrollably allide into bridges or other structures.

3. In other instances, turns or bends in the river may require a pilot to lay his barges alongside dolphins at one bridge to point them in the proper direction so as to enable the barges to safely navigate the next stretch of the river. This is also a normal and common practice. The pilings act as a fulcrum against which the captain swings the barges into the necessary position to further pilot the barges.

4. It is also common practice for pilots to use the dolphins to define the river's navigable channel and act as buoys or markers. Especially where the channel narrows and turns, as with Kinzie Street on the North Branch of the Chicago River, the dolphins are visual aids which enable the pilot to plot the safest and most efficient course. Furthermore, like the other pile clusters in District I of the Chicago Harbor, the Kinzie Street dolphins are made of timber and are designed to protect the vessel from the bridge and as well as the bridge from the vessel. If the

pilings did not exist, a vessel could allide into the concrete and steel bridge, which would cause extensive damage to the vessel and possibly close the bridge to masted traffic. Timber pilings, on the other hand, bend and take some of the force away from the allusion. Timber dolphins are much kinder to vessels.

FURTHER AFFIANT SAYETH NOT.

/s/ BILL SPIVEY
Bill Spivey

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff, v. CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	IN ADMIRALTY No. 92 C 6754 Hon. Charles P. Kocoras

AFFIDAVIT OF LARRY TIERI

Larry Tieri, certifies under penalty of perjury that the following statements are based on his personal knowledge and are true and correct:

1. I am a Construction Administrator, employed by Great Lakes Dredge & Dock Company ("Great Lakes"). I have been employed by Great Lakes between April, 1956 - May, 1959 and from August, 1967 to present.

2. On September 16, 1991 I took photographs of the pile driving work being performed by Great Lakes on the North Branch of the Chicago River near the Kinzie Street bridge, in Chicago, Illinois.

3. I arrived at the Kinzie Street bridge on the morning of September 16, 1991. The photographs appended to this affidavit were all taken by me on September 16, 1991. These photographs truly and accurately depict the subjects shown in the photographs.

4. The photograph labeled Exhibit 1 was taken from the Kinzie Street bridge looking south. It depicts Barge No. G.L. 136 on the left side of the photograph and Barge No. G.L. 150 on the right side of the photograph. Aboard the Barge No. G.L. 150 can be seen both the new pilings to be driven into the riverbed and the old pilings which had been pulled up from the river and were to be hauled down river to their disposal site. The view of both vessels is from their bows to their sterns. The top of the PEACH STATE's bridge can be seen behind Barge No. G.L. 150.

5. Exhibit 2 is a photograph taken from the Kinzie Street bridge looking south. Exhibit 2 also shows Barge No. G.L. 136 to the left and Barge No. G.L. 150 to the right, with the PEACH STATE behind Barge No. G.L. 150. Both Exhibits 1 (center) and 2 (lower right) show a new pile in the process of being attached to the leads of the pile driving rig.

6. Exhibit 3 is a photograph taken from the Kinzie Street bridge looking South. Exhibit 3 shows the bow of Barge No. G.L. 150 in the right foreground, Barge No. G.L. 136 on the left and the PEACH STATE once again behind Barge No. G.L. 150. In this photograph, a new pile is being lifted off of the Barge No. G.L. 150.

7. Exhibit 4 is a photograph taken from the Kinzie Street bridge looking southeast at the work site. It shows part of Barge No. G.L. 150 with old and new piles in the foreground, and part of Barge No. G.L. 136 alongside. The pile driving crane sits atop Barge No. G.L. 136 and the

photograph shows a new pile in the process of being driven into the riverbed.

8. Exhibit 5 is a photograph taken from the Kinzie Street bridge looking southeast. This photograph shows the bow and starboard sides of Barge No. G.L. 150, with Barge No. G.L. 136 alongside. The bridge house can be seen in its entirety on the left side of the photograph. Exhibit 5 shows the driving of a new pile into the riverbed. Exhibit 5 also shows that Barge No. G.L. 150 was in the navigable channel when the photograph was taken.

Further affiant sayeth not.

/s/ LARRY TIERI
Larry Tieri

SUBSCRIBED AND SWORN TO
before me this 2nd day
of December 1992.

/s/ MARGARET H. ZINNA
Notary Public

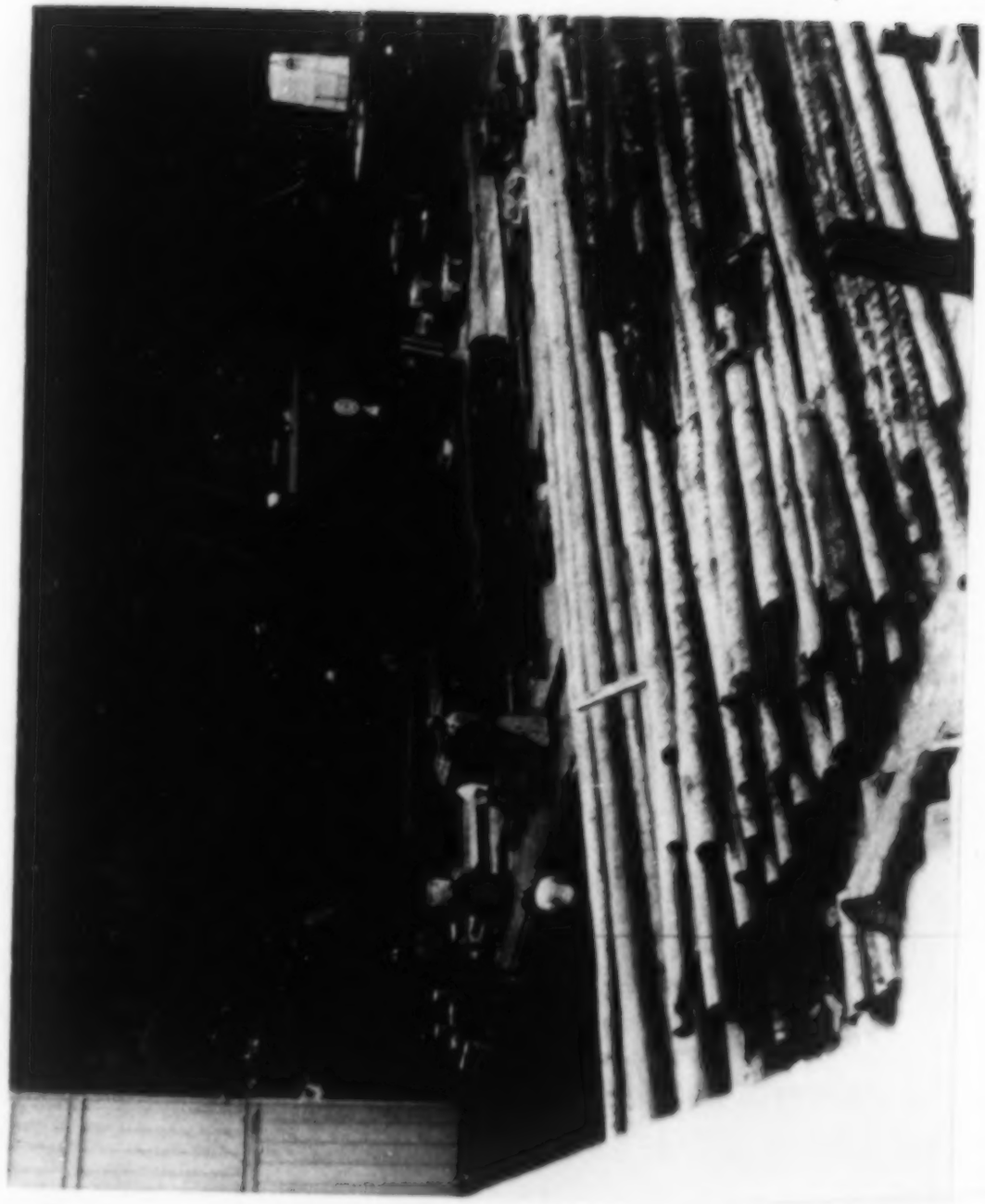
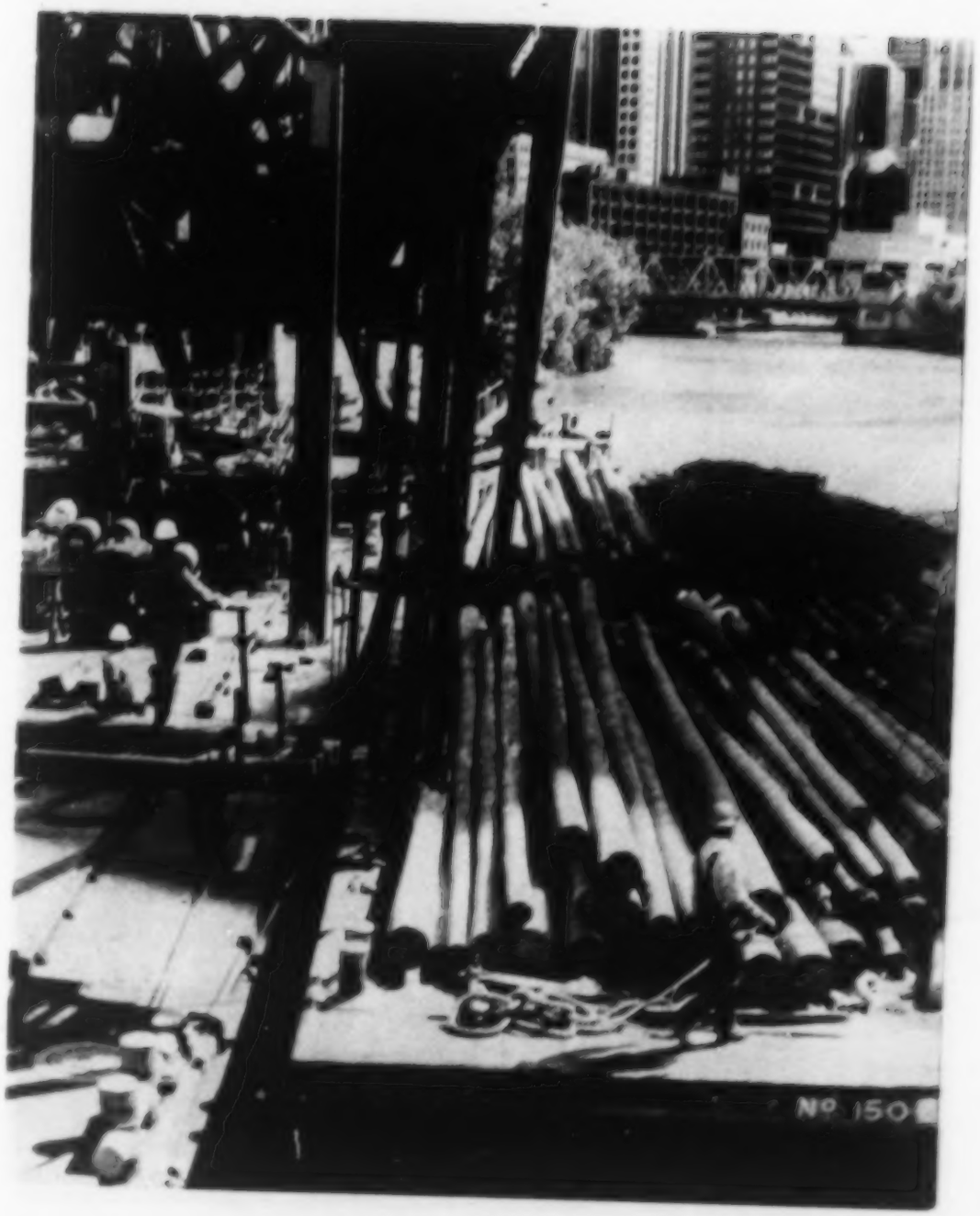


Exhibit 1



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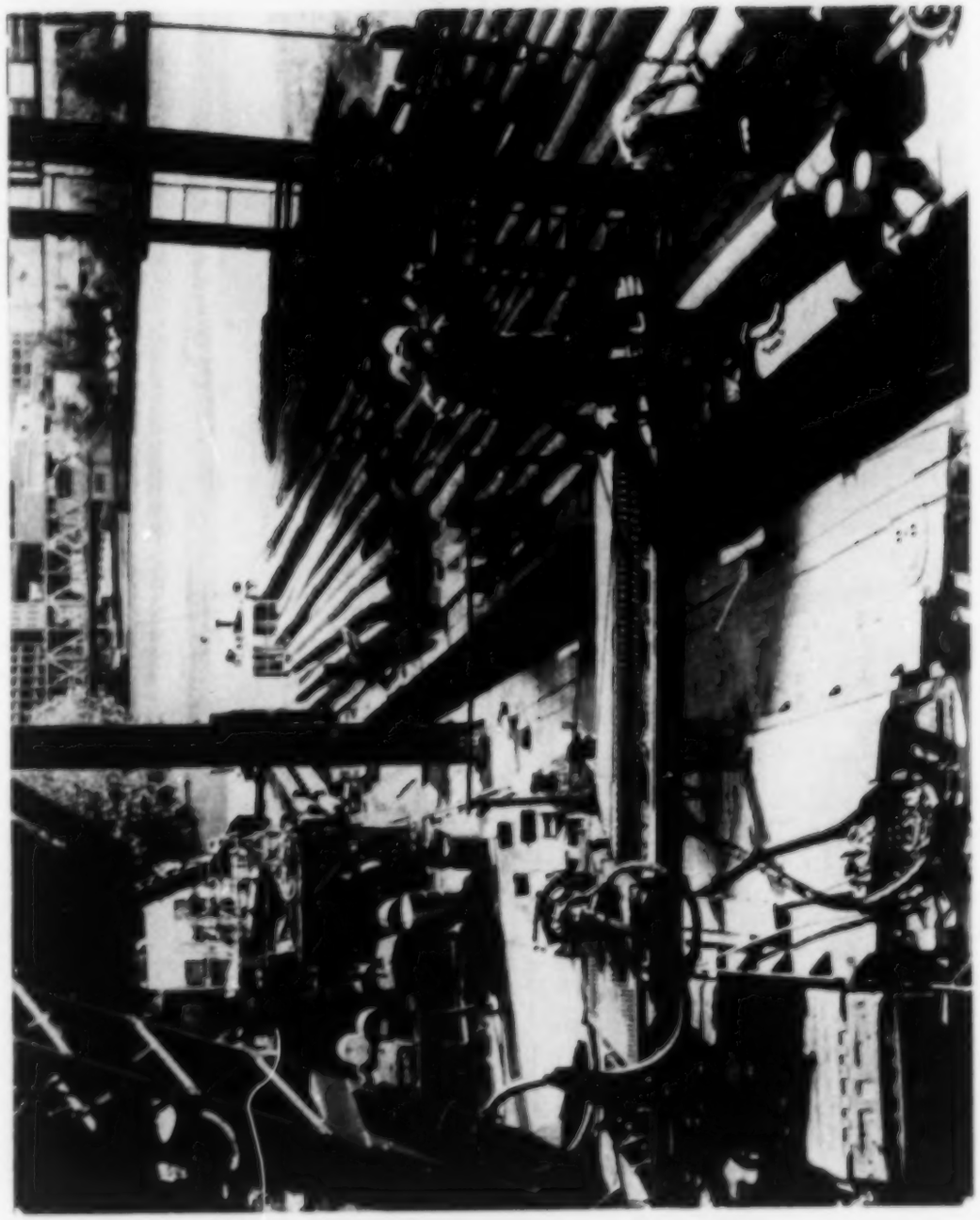

Exhibit 3

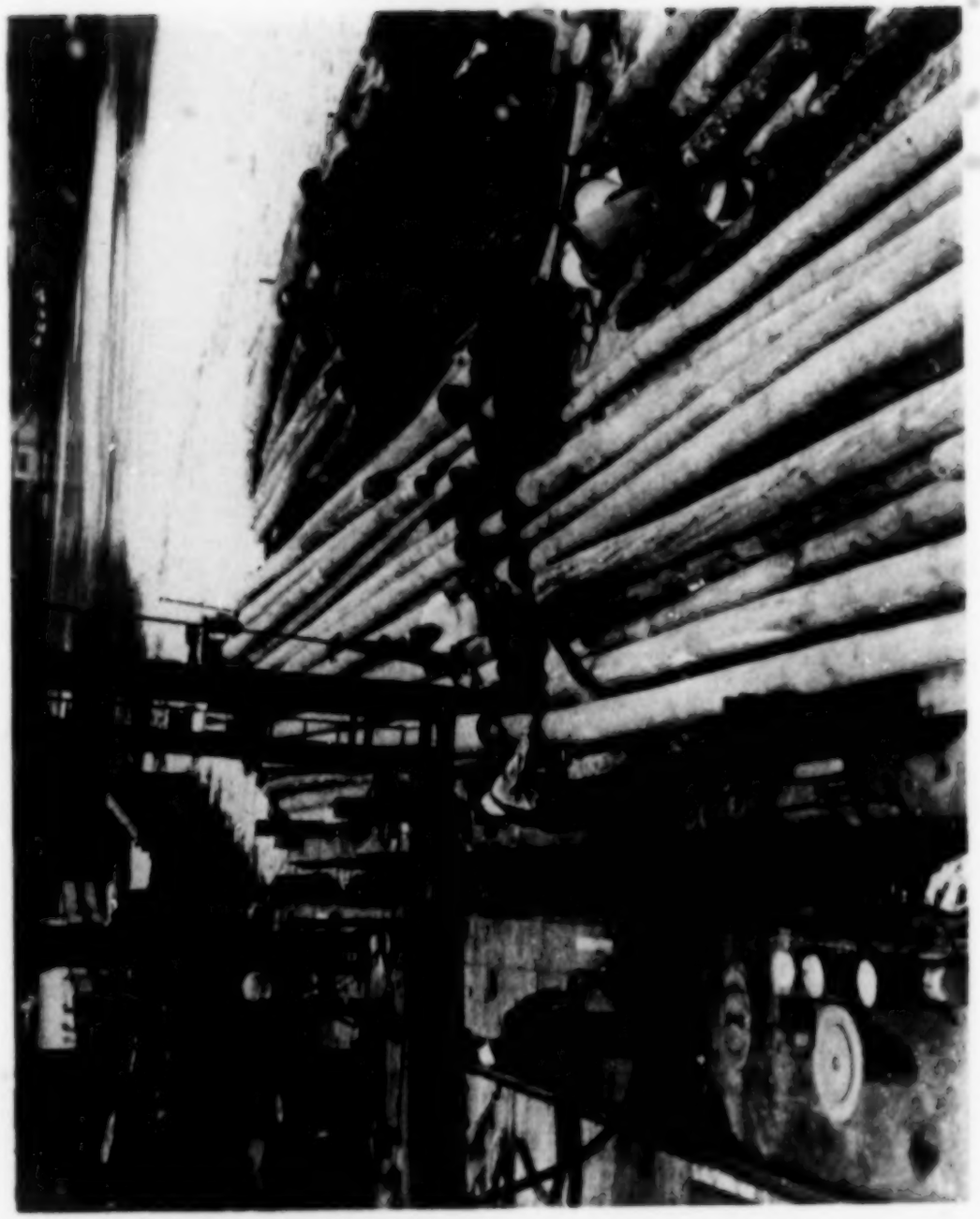

Exhibit 4

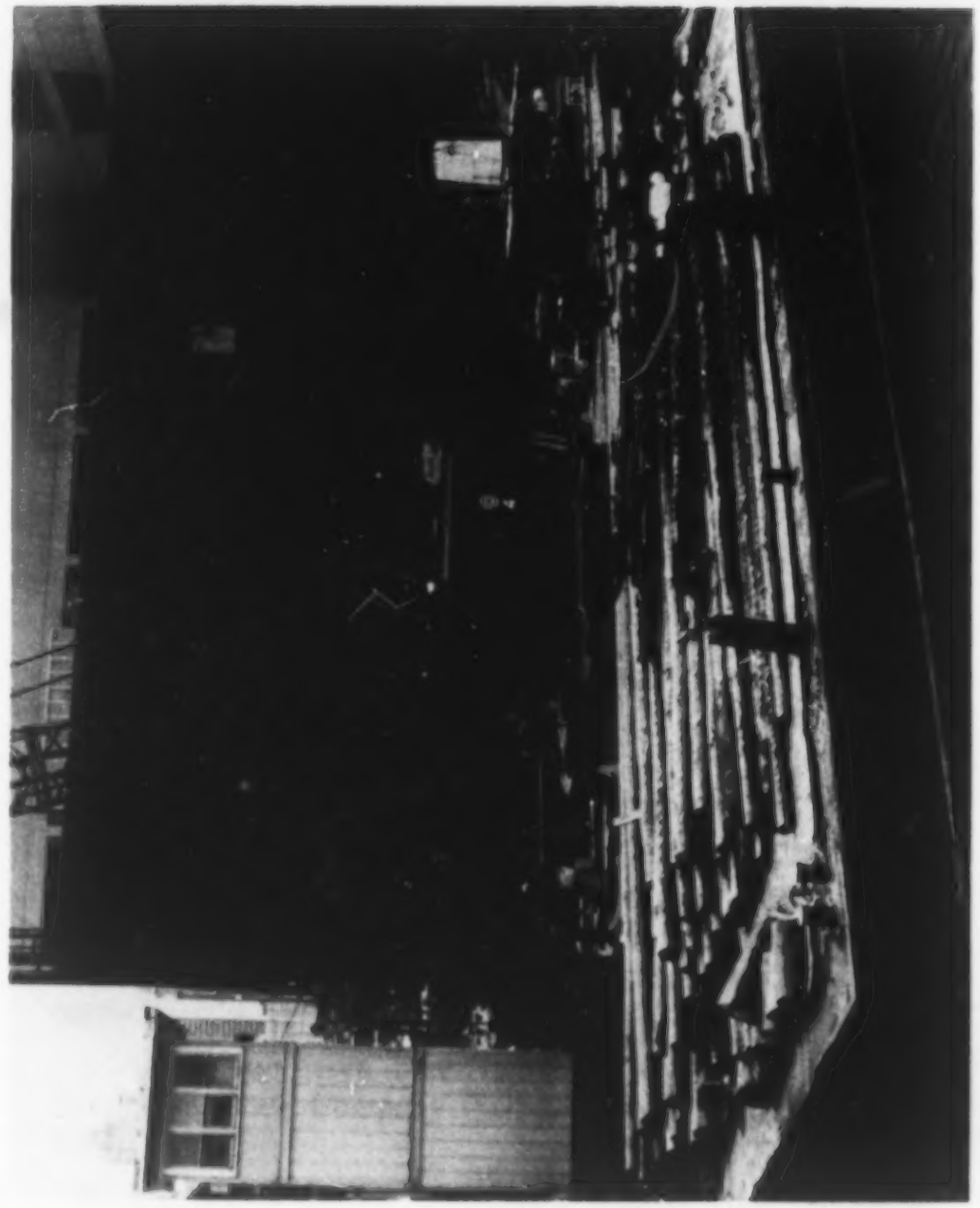

Exhibit 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff,	IN ADMIRALTY No. 92 C 6754
v.	Hon. Charles P. Kocoras
CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	

AFFIDAVIT OF WAYNE S. VALLEY

Wayne S. Valley being first duly sworn on oath, certifies under penalty of perjury that the following statements are based on his personal knowledge and are true and correct:

1. I am and have been employed by Great Lakes Dredge & Dock Company ("Great Lakes") since June, 1969.

2. My duties include overseeing marine construction and repair projects throughout the United States, including the project which is the subject matter of Great

Lakes' complaint. My duties do not include direct site supervision.

3. The City of Chicago solicited contractors like Great Lakes to bid on a contract to replace 14 deteriorated pile clusters (known as "dolphins") at five locations in the Chicago River, including the dolphins on the south side of the Kinzie Street bridge, and Great Lakes won the contract. As part of my marine construction project responsibilities, I attended the May 30, 1991 pre-construction meeting called by the City regarding the project. Attached as Exhibit 1 is a list of the attendees at this pre-construction meeting. The meeting was run by Frank Ociepka, the City's Project Manager for this project. Also participating for the City were Dennis Sadowski, the City's Coordinating Engineer, and James Bolster, the City's Resident Engineer. In preparation for that meeting I reviewed the specifications for the work to be performed. In addition, during the course of the work, I was in contact with City personnel on a variety of issues regarding the project. At no time prior to, during or subsequent to the pre-construction meeting, did anyone from the City of Chicago advise me, or anyone else at Great Lakes, as to the existence of the Chicago Freight Tunnel beneath the Chicago River near Kinzie Street.

4. Historically, dolphin repair, maintenance and construction projects, like the one in issue, have been undertaken by marine firms such as Great Lakes, Thatcher Engineering or Illinois Constructors. This is because the work must be performed from vessels in the navigable channel, and those vessels have to be moved from time to time to permit other maritime traffic to pass. The contract specifically required Great Lakes to comply with U.S. Coast Guard regulations protecting the right of other

vessels to navigate past the work site. (See ¶ 209 of Contract attached as Exhibit B to Grubart's motion. Attached as Exhibit 2 is a true and correct copy of the Notice to Mariners issued by the United States Coast Guard on June 14, 1991. Page 6 "of 7" contains the entry prepared by Great Lakes providing notice of the dolphin replacement project. Vessels affected by the work were directed to radio Barge No. G.L. 136 to request Great Lakes to clear the navigable channel.

5. Barge No. G.L. 136 and Barge No. G.L. 150 are barges owned by Great Lakes. The M/V PEACH STATE is a launch (also referred to as a tug boat) owned by Great Lakes. Attached hereto as Exhibits 3, 4 and 5 are true and correct copies of the United States Coast Guard's Certificate of Documentation for these three vessels, which show that each is registered for plying the Great Lakes and U.S. coasts.

6. These vessels were the three vessels employed by Great Lakes for the dolphin replacement project, including the pile removal and replacement near Kinzie Street which is the subject matter of Great Lakes' complaint.

7. Attached hereto as Exhibits 6 and 7 are the Load Line Certificates from the American Bureau of Shipping regarding both barges. The Certificates establish that these vessels have been surveyed and found in compliance with the Load Line Regulations of the United States Coast Guard, thereby certifying these barges for operation in the open, unprotected waters of the Great Lakes.

8. The M/V PEACH STATE is not required to be certified by the American Bureau of Shipping or the U.S. Coast Guard to enable it to operate in open waters.

9. Part of my job responsibilities include the assignment of those vessels to various work sites and projects.

10. Both prior and subsequent to the pile replacement project related to this litigation, Barge No. G.L. 136 has travelled throughout the navigable waters of the United States to perform a variety of assignments. Currently it is located in the Cuyahoga River near Cleveland, Ohio. In August, 1992 it was used for dredging the Buffalo River near Buffalo, New York. In March, 1992 it was employed in the Chicago Sanitary and Ship Canal near Interstate 294. During this time period, Barge No. G.L. 136 was towed on these rivers and Lakes Michigan, Huron and Erie.

11. Prior to the pile replacement project related to this litigation, both barges were engaged in a pile replacement project in November, 1990 near Ewing Avenue in the Calumet River. In October, 1990 Barge No. G.L. 136 participated in the salvage of a World War II U.S. Navy divebomber from the bottom of Lake Michigan more than 14 miles from shore. A photograph of Barge No. G.L. 136 in the open water of Lake Michigan taken during the Navy divebomber recovery project is attached hereto as Exhibit 8. (The tug shown in Exhibit 8 is the PAUL R. DICKINSON.) Photographs of Barge No. G.L. 150 in Lake Michigan are attached hereto as Exhibit 9. In September, 1990, Barge No. G.L. 136 was employed to obtain soil borings from the bottom of Lake Michigan off Lake Bluff, Illinois. In July, 1990 both barges were used to replace a failed dock in the Calumet River at 104th Street. In March, 1990 Barge No. G.L. 136 was used to repair a pipeline for Commonwealth Edison in Lake Michigan off Zion, Illinois. In February, 1990 it was sent to remove a compressor from a ship in Lake Calumet. In May, 1990 both barges were used to install a sheet piling bulkhead in Lake Michigan for Loyola University. In November, 1989 and December, 1988 Barge No. G.L. 136

was employed to place wave gauges in Lake Michigan. In May, 1988 both barges were in the Calumet River at 95th Street to remove a damaged bridge. In February, 1988 both barges were in the Main Branch of the Chicago River assisting with the construction of Chicago's Centennial Fountain. In October, 1987 both barges were assigned to replace a sheet pile wall in East Chicago, Indiana and to repair two lakefront cells in Lake Michigan at Gary, Indiana. In May, 1987 both barges were used to repair a pile fender system in the Calumet River. In February, 1986 they were used to construct new dock facilities at Burns Harbor, Indiana. In September, 1985 they were employed to replace a collapsed dock in Indiana Harbor, Indiana. In December and August, 1983 they were engaged in two dock construction projects in the Chicago River. In April, 1983 they were employed in the Calumet River to replace a damaged dock. In May, 1982 they were in Monroe Harbor, Illinois, for the construction of new docks at the Columbia Yacht Club. In July, 1981 the Barge No. G.L. 136 was in Lake Calumet to repair mooring dolphins. In each instance cited above and in paragraph 10, the barges were towed to and from each project over navigable waters.

12. Barge No. G.L. 150 is used primarily to transport cargo materials, equipment and/or excavation refuge [sic] to and from the various work sites. In the case of the pile replacement project at issue in this litigation, Barge No. G.L. 150 was used to bring new piles to the Kinzie Street work site and then to stow and later transport the old piles removed from the river away from the work sites for disposal. In the other instances referred to above, Barge No. G.L. 150 had been used to transport similar wooden piles to and remove old piles from the November, 1990 and May, 1987 pile cluster jobs on the Calumet

River. It was used to transport the sheet piling driven in Lake Michigan for the May, 1990 project for Loyola University. It was used to transport the construction materials used in the other jobs identified in paragraph 11 which involved the construction of dock or other facilities.

13. Barge No. G.L. 136 is used to transport various equipment placed upon it to execute the required work to be performed. Exhibit 8 to this affidavit shows it configured with, among other equipment, Great Lakes' Crane No. 16 for the retrieval of the Navy divebomber. The array of its marine communication system can be seen in the photograph near the stern. In the photograph exhibits to Lawrence Tieri's affidavit, Barge No. G.L. 136 is shown at the Kinzie Street site with Great Lakes' Crane No. 4. Depending upon the requirements of the specific project, different equipment is put on the barge.

Further affiant sayeth not.

/s/ WAYNE S. VALLEY
Wayne S. Valley

(Letterhead Of)

U.S. Department of Transportation
United States Coast Guard

LOCAL NOTICE TO MARINERS

Issued by: Commander, Ninth Coast Guard District (can),
1240 East Ninth Street, Cleveland, OH 44199-2060
Telephone: (216) 522-3991

[June 14, 1991]

* * * *

VIII. GENERAL NOTICES

* * * *

LAKE MICHIGAN - IL - Chicago River - North & South Branches - Bridge Maintenance, Chart 14927

Great Lakes Dredge & Dock Co. will be conducting bridge maintenance operations to the Cermack [sic] Rd, Madison St, Washington St, Kinsie [sic] Ave, and Chicago Ave bridges from 1 July until approximately 7 November, 1991. Operations will be conducted from 0700-1700 Monday-Friday. The spud scow 136 may be contacted on channel 10 & 16 VHF-FM. During operations the equipment will be positioned parallel to the channel along dock walls with a deck scow alongside. Equipment will be moved when necessary to facilitate vessel passage. The bridges will be worked in the above mentioned order. Caution is advised.[14/91]

* * * *

G. A. PENINGTON
Rear Admiral, U.S. Coast Guard
Commander, Ninth Coast Guard District

* * * *

Exhibit 2

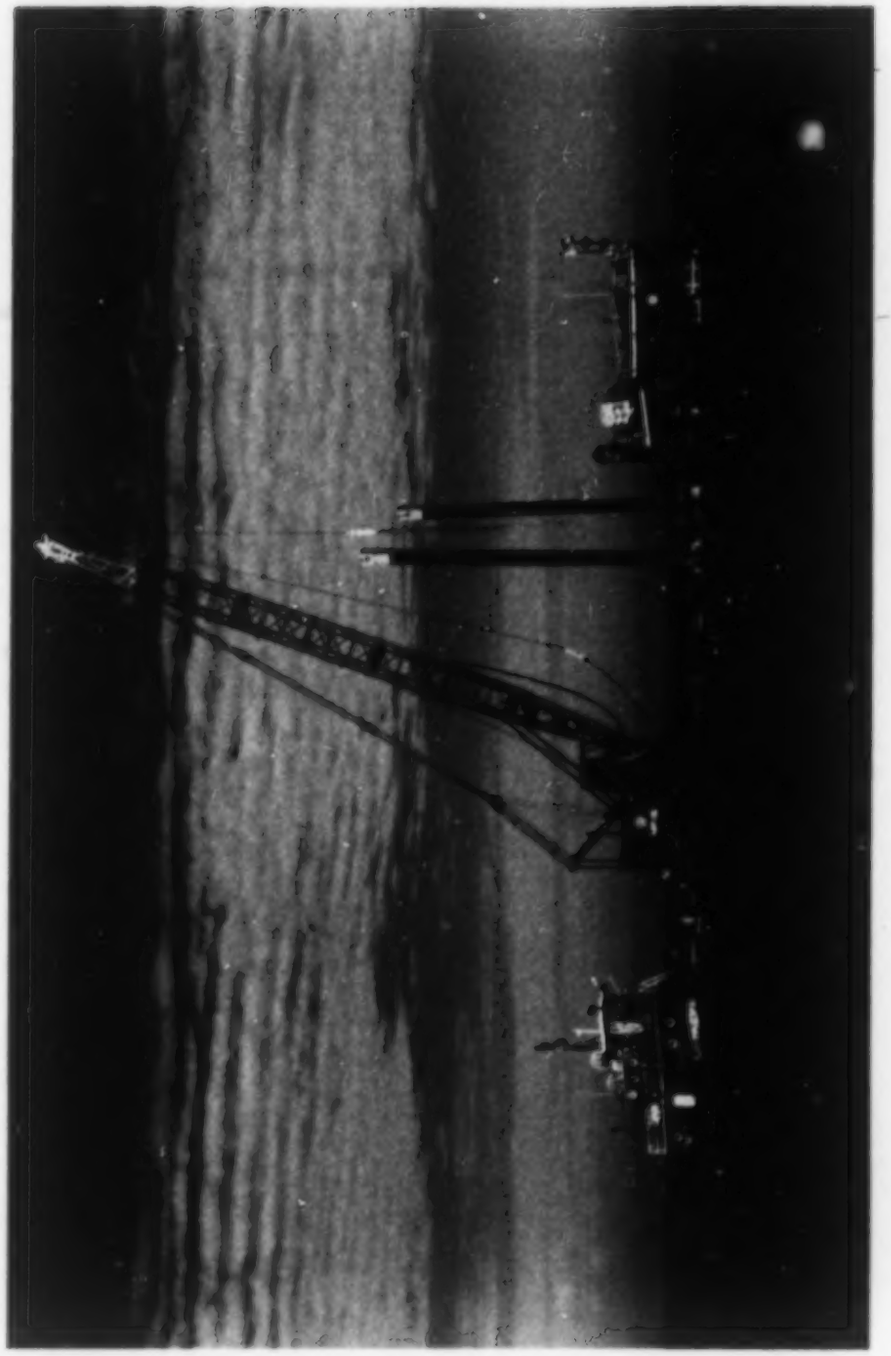

Exhibit 8

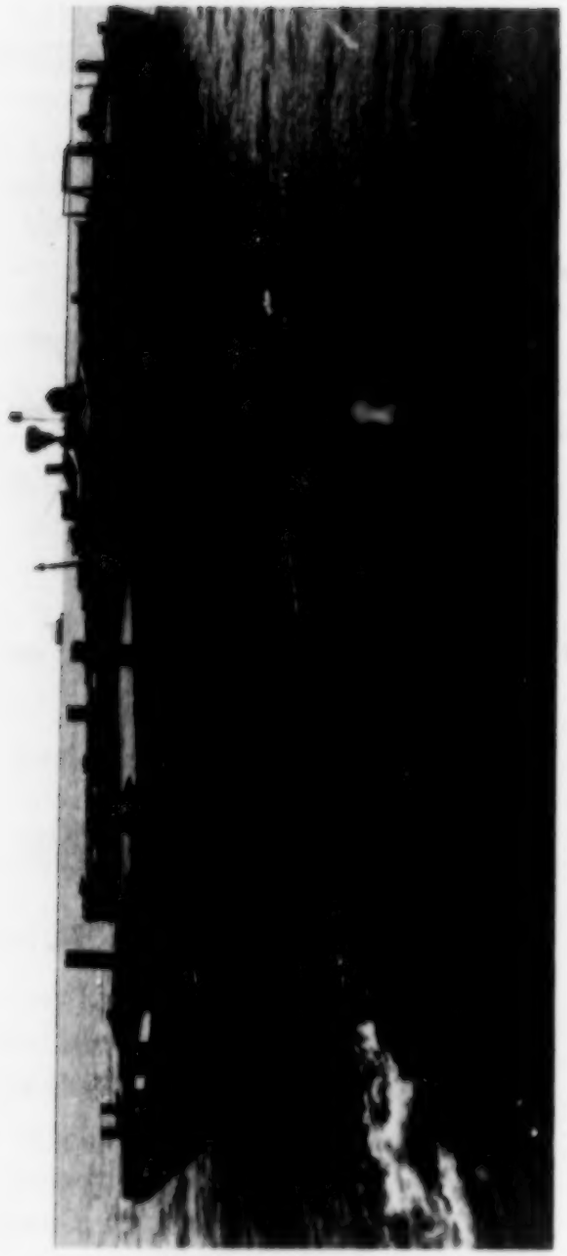

Exhibit 9

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Complaint of GREAT LAKES DREDGE & DOCK COMPANY for Exoneration from or Limitation of Liability	)	
GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff,	)	IN ADMIRALTY
v.	)	No. 92 C 6754
	)	Judge Kocoras
CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	)	

AFFIDAVIT OF RICHARD H. HEISS

Your affiant, Richard H. Heiss, deposes and states:

1. If called upon to testify at a trial or hearing of this matter, I could and would competently testify to the following based upon my personal knowledge.

2. During my high school and college years, I spent summers working odd jobs in the barge shipping industry. I received a B.A. degree from Southern Illinois University in 1971. I have been a marine surveyor since 1973 when I began my career as a surveyor with employment by the firm of Hunt, Leitner and Company, Inc. In 1975,

I took a position as Chicago area maintenance coordinator with what was known as the S.C. and N.O. Barge Lines, and which has since been bought out by American Commercial Barge Line Company. In 1979, I took a position with Rose Marine Services engaging in marine surveying work. In 1981, I formed Independent Marine Services with a partner and I became sole owner thereof in 1988. Independent Marine Services is a marine surveying company. During my career as a marine surveyor, I have conducted hundreds of surveys of damages to vessels and land structures.

3. A spud scow is a specialized type of deck barge designed and utilized as a construction platform. It may maintain its position by dropping spuds into the bed of the waterway or, dependent on design, by lifting itself out of the water for maximum stability.

4. A dolphin is a wood or steel structure generally utilized for mooring purposes, whereas a pile cluster is constructed of wood and is used as either a protective structure or for mooring. A pile cluster is a group of wood pilings driven in a circular fashion and bound at the top with wire rope or chain. If a wood pile cluster is designed and installed adjacent to a bridge such as the Kinzie Street Bridge in Chicago, Illinois, its purpose is to afford protection to that bridge.

5. In normal conditions, a pilot of a towboat or tug which is towing/pushing barges on the river will not voluntarily contact or land on anything that can be avoided, including pile clusters. This is particularly the case with a big tow which will have a massive weight and which could very likely overcome the resiliency of a wooden pile cluster. Pilots would be concerned about claims against them for damaging the pile clusters and the structures

which the pile clusters are protecting. Pilots would also be concerned with damage to their vessels from obstructions on or around the pile clusters, particularly, any hidden obstructions on or around the pile clusters below the water level.

FURTHER AFFIANT SAYETH NOT.

/s/ RICHARD H. HEISS
Richard H. Heiss

VERIFICATION BY CERTIFICATION

Under penalty of perjury, the undersigned states that he has read the above and foregoing affidavit and that the statements therein are true and correct.

/s/ RICHARD H. HEISS
Richard H. Heiss

(5) (5)

Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER JEROME B. GRUBART, INC.

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47 pp

QUESTIONS PRESENTED

Whether the Seventh Circuit erred in holding, in conflict with other courts of appeals, that *Sisson v. Ruby*, 497 U.S. 358 (1990), forecloses consideration of the totality of the circumstances in the admiralty jurisdiction inquiry, and thereby extends admiralty law to situations where the injured parties and the instrumentalities have no maritime connections or attributes?

Does not the nexus prong of the *Sisson* test contemplate that the "activity" necessarily be defined differently from the "incident"?

LIST OF PARTIES

The Petitioner is Jerome B. Grubart, Inc.,* a claimant in the limitation proceeding. The City of Chicago, a defendant in the proceedings below, filed a separate petition for writ of certiorari (No. 93-1094) which was granted and consolidated with this matter. The Respondent is Great Lakes Dredge & Dock Company.

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* Pursuant to Supreme Court Rule 29.1, Petitioner Grubart states that it is a wholly owned subsidiary of Steven T. Grubart, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE PETITIONER JEROME B. GRUBART, INC.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 3 F.3d 225 (7th Cir. 1993), and is reprinted in Petitioner Grubart's Appendix to its Petition for Certiorari at Pet. App. 1. The order of the Court of Appeals for the Seventh Circuit denying Grubart's petition for rehearing with suggestion for rehearing *en banc*, and amending the Seventh Circuit opinion, is reprinted at Pet. App. 17. The memorandum opinion of the United States District Court for the Northern District of Illinois, Eastern Division (Judge Kocoras) has not been reported. It is reprinted at Pet. App. 22.

JURISDICTION

Respondent brought this action in the United States District Court for the Northern District of Illinois invoking federal admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, and seeking exoneration from or limitation of any liability it might incur from various state and federal common law actions. On February 18, 1993, the district court dismissed Respondent's complaint both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

On Respondent's appeal, the Seventh Circuit reversed the district court's order on August 24, 1993, and remanded the matter for further proceedings. By order dated October 7, 1993, the Seventh Circuit denied Grubart's petition for rehearing and amended its opinion of August 24th. (Pet. App. 17-19).

On Grubart's motion, the Seventh Circuit stayed the mandate pending the filing of a petition for certiorari. (Pet. App. 20). The mandate has been stayed pursuant to Federal Rule of Appellate Procedure 41(b) until final disposition by this Court.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1). On February 22, 1994, this Court granted certiorari and consolidated it with the City of Chicago's petition (No. 93-1094).

STATUTES INVOLVED

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act [46 App. U.S.C. 781 et seq.] or Suits in Admiralty Act [46 U.S.C. 741 et seq.], as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT OF THE CASE

Thousands of plaintiffs, including Petitioner, Jerome B. Grubart, Inc., were included in the scope of the "Chicago Flood" class-action lawsuit against Respondent, Great Lakes Dredge & Dock Company ("Great Lakes"), in the Illinois state court. The class action complaint (Record at 44, Tab A) alleges that Great Lakes, while under contract to the City of Chicago ("City"), negligently removed and replaced pile clusters in the Chicago River juxtaposed to a bridge on Kinzie Street in Chicago. The contract was entitled "Various Drawbridges New Pile Clusters" (J.A. 16) and Great Lakes performed the work near a number of bridges during the summer and fall of 1991. The pile driving work was performed using a tractor-crane sitting atop a stationary barge in the river. (*See* photos at J.A. 64-68).

Great Lakes' activities, along with the City's failure to repair, led to the rupture of an extensive underground freight tunnel system ("the tunnel") owned by the City and located under the riverbed at the Kinzie Street bridge. The tunnel traverses the downtown business district of Chicago, popularly known as the Loop, and directly connects to a number of Loop buildings. On April 13, 1992, over six months after Great Lakes completed its work, river water cascaded into the tunnel at the Kinzie Street work site and inundated the basements of numerous downtown buildings, including the two locations of Grubart. Grubart's two locations are typical of those of the class action plaintiffs in that they are located in the Loop, which is generally said to begin approximately six blocks from the area of the tunnel breach.

After considering a number of repair options, the City obtained the assistance of the U.S. Army Corps of Engineers to drain and repair the tunnel. To facilitate that

repair work, the river in the general area of the breach was closed to river traffic not related to tunnel repair.

On October 6, 1992, a few days before the period for filing an admiralty claim was to expire, Great Lakes filed a three-count complaint in federal district court seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.* and, additionally, indemnity and contribution from the City for all losses and damages occasioned and incurred from the breach of the tunnel. The complaint alleged admiralty jurisdiction pursuant to 28 U.S.C. § 1333 and the Admiralty Extension Act, 46 U.S.C. § 740. Upon the filing of its complaint, Great Lakes received a stay from the district court against all actions filed against it arising out of the tunnel disaster.

Grubart, a claimant in the limitation proceeding, moved with the City to dismiss Great Lakes' admiralty complaint. The district court dismissed the complaint, holding that it did not have subject matter jurisdiction and that Great Lakes' complaint failed to state a claim upon which relief could be granted. This dismissal was reversed by the United States Court of Appeals for the Seventh Circuit, but its mandate to the district court has not issued because of the granting of Grubart's motion for a stay of the mandate.

SUMMARY OF ARGUMENT

The Court of Appeals erred in asserting maritime jurisdiction over thoroughly nonmaritime activities and injuries. *Sisson v. Ruby*, 497 U.S. 358 (1990), recognized that if the relevant entities and instrumentalities were not all engaged in the same types of activity, further refinement of the admiralty jurisdiction test might be required. This case presents such a situation. Here, Great Lakes performed maintenance work relating to a bridge using a mobile, land-type crane sitting atop a stationary barge affixed to the river bottom near the river's edge. This work damaged an underground tunnel system located far under the riverbed and, along with the City of Chicago's inaction in repairing the tunnel, six months later caused massive property damage and economic loss many blocks inland to thousands of downtown businesses such as Grubart's shoe stores.

Neither the situs nor the nexus requirements of this Court are satisfied by these facts. The Seventh Circuit found that Great Lakes' work "related" to traditional maritime activity and that the requisite impact on maritime commerce was provided by a closing of the river, an after-the-fact event clearly attributable to a post-accident, discretionary decision related solely to tunnel repairs. The court's misapprehension of the *Sisson* "activity" and "incident" inquiries resulted in a finding of admiralty jurisdiction without any federal interest having been identified. The court's assumption of a federal interest would have been readily dispelled by consideration of the broader relevant circumstances.

The Seventh Circuit's pedantic analysis of the three *Sisson* questions effectively makes every activity involving a vessel on navigable waters a traditional maritime activity sufficient to invoke maritime jurisdiction without regard to the activities of the other relevant entities. The Court of

Appeals dismissed the importance of the differing activities of the parties by summarily applying the Admiralty Extension Act; this approach bootstrapped the nexus requirement. But *Sisson* suggests that the jurisdictional nexus perspective must be expanded to address the concerns and interests of all the parties before one concludes that a federal interest is involved and that it is best served by invoking maritime jurisdiction. In fact, this approach is followed by the other courts of appeals which have considered the question. Here, the district court which considered all the relevant circumstances, concluded that such a federal interest was absent when "land-based injuries [are] caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform." (Pet. App. 39-40). The Seventh Circuit might also have agreed had it not interpreted *Sisson* to preclude an independent policy analysis in the jurisdictional inquiry.

Sisson admonishes that "the demand for tidy rules" must not divorce "the jurisdictional inquiry from the purposes that support the exercise of jurisdiction." 497 U.S. at 364 n.2. The underlying policies supporting the grant of admiralty jurisdiction are furthered by rejecting those situations, such as this one, that lack the flavor of maritime law and advance no federal interest. Admiralty jurisdiction is a reasoned category of substantive concerns, not an arbitrary division of state and national power. In determining the scope of admiralty jurisdiction, weight should be given to a judgment that will relieve the federal courts of the burden of cases essentially irrelevant to their constitutional and statutory missions.

ARGUMENT

I.

THERE IS NO ADMIRALTY AND MARITIME JURISDICTION UNDER 28 U.S.C. § 1333 AFTER CONSIDERATION OF ALL THE RELEVANT CIRCUMSTANCES.

A. The *Sisson* Nexus Test Should Not Be Mechanically Applied.

The Seventh Circuit found admiralty jurisdiction by erroneously applying the three-prong admiralty jurisdiction test of this Court in *Sisson v. Ruby*, 497 U.S. 358 (1990). *Sisson* was the last of a trilogy of Supreme Court cases discussing the "nexus" requirement for admiralty jurisdiction. A nexus requirement was first established by this Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). In *Executive Jet*, a commercial aircraft crashed into navigable waters just after taking off from Cleveland's airport. The *Executive Jet* Court eliminated the so-called strict "locality" or "situs" test as the determinative factor in applying federal admiralty jurisdiction and added a "nexus" component—that the wrong must bear a significant relationship to traditional maritime activity. After applying the new test to the facts before it, the Court held that there was no admiralty jurisdiction arising out of the crash of an airplane into navigable waters. 409 U.S. at 274. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), the Court extended *Executive Jet's* two-pronged test to a non-aviation situation. In *Foremost*, the Court found that a traditional maritime activity was implicated from the collision of two pleasure vessels on navigable waters because such a collision represented a potential hazard to maritime commerce. 457 U.S. at 677. The nexus component was most recently refined in *Sisson*. *Sisson* involved a fire in a washer/dryer unit in a moored yacht at a marina. The fire damaged nearby vessels and the marina itself. Again, non-commercial vessels were involved but unlike in *Foremost*,

the vessels were not engaged in actual navigation. The *Sisson* Court determined that the storage and maintenance of a vessel at a marina on navigable waters was a traditional maritime activity and judged the incident, the vessel fire, to be a "potential hazard" to maritime commerce. 497 U.S. at 360-367. The Court further refined the nexus part of the test by adding that: (1) the incident giving rise to the claim must have the potential to disrupt maritime commerce; and (2) the activity giving rise to the incident must have a substantial relationship to maritime activity. 497 U.S. at 362-364. The factual configuration in the instant matter—the parties being engaged in different activities—was not before the Court in *Sisson* or any of its predecessors, a fact *Sisson* explicitly noted could require further refinement of the jurisdictional test. 497 U.S. at 365-366 nn.3-4.

The Seventh Circuit's interpretation of the admiralty jurisdiction test differed from that of the district court which engaged in a policy analysis and examined the totality of the circumstances, including the function and role of the injured parties and the nature of the injuries. Although Grubart, as with other injured parties, was not engaged in the same activity as Great Lakes, the Seventh Circuit rhetorically asked the three *Sisson* questions only as they related to Great Lakes: (1) Did the alleged wrong occur on navigable waters of the United States? (2) Did it pose a potential hazard to maritime commerce? (3) Was it substantially related to traditional maritime commerce? *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993). In restricting the inquiry to Great Lakes, the Court of Appeals explicitly rejected a totality of the circumstances approach like that used in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1974), *cert. denied*, 416 U.S. 969 (1974), and since adopted by many of the other courts of appeals which have extended the examination to all of

the relevant parties.[1] *See, e.g., Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131, 135-136 (4th Cir. 1991) (analysis of four factors tempered by traditional concern of admiralty law for torts arising out of navigational errors); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 885 (5th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 654 (1994); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 440 (5th Cir. 1991); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1263 (9th Cir. 1993) (four-factor test valid except that causation aspect dropped in view of *Sisson*); *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993); *Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636, 640-642 (11th Cir. 1992); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538-1539 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992).

In contrast, the district court considered the role and functions of all the parties in a combined *Kelly-Sisson* analysis to find that "[t]here are no traditional maritime concerns present here. . . ." (Pet. App. 40). It based its conclusion on the following findings and undisputed facts:

1. None of the vessels [was] directly involved in the cause of the injury to the tunnel wall and did not strike anything to cause the harm in question.
2. The vessels were acting as fixed platforms and were not involved in navigation on a waterway during the pile driving activities.

[1] The Seventh Circuit also rejected the *Kelly* test when the *Sisson* case was before it. It did not find the test "helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*." *See In re Complaint of Sisson*, 867 F.2d 341, 345 n.2 (7th Cir. 1989), *rev'd*, *Sisson v. Ruby*, 497 U.S. 358 (1990). It now suggests that such an inquiry is inappropriate after *Sisson*. 3 F.3d at 228.

3. The injuries were not sustained on a dock or pier next to the site of the work activity, but were experienced on land, blocks away in Chicago's business district.
4. Pile driving is a common construction activity and is found in both maritime and non-maritime settings. The principal purpose of the placement of the dolphins [pile clusters] at the Kinzie Street site was the protection of the bridge, which the Supreme Court views as an extension of land.
5. The pile driving activity did not present a foreseeable or material disruption of maritime commerce on the Chicago River. The actual effect on commerce took place many months after the alleged wrongful acts and were part of the massive remediation efforts engaged in by the City and others.
6. There are no allegations of personal injury on a vessel on navigable waters, nor for damage done to a vessel in navigation or its cargo.

(Pet. App. 38-39).

In view of this factual background, the United States Court of Appeals for the Seventh Circuit erred, as a matter of law, in finding admiralty jurisdiction. The Seventh Circuit did not fairly apply the *Sisson* test because, among other reasons, that test does not require courts to ignore the totality of the circumstances in determining admiralty jurisdiction. The factual situations presented by *Sisson*, *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), involved parties engaging in a similar activity, and thus did not require inquiry into all of the factors comprising the totality of the circumstances tests:

> In this case, all of the instrumentalities involved in the incident were engaged in a similar activity. . . . The facts of *Executive Jet* and *Foremost* also reveal that all the relevant entities were engaged in a common form of activity. See *Executive Jet* . . . (entities involved in the incident were engaged in nonmaritime activity of facilitating air travel); *Foremost* . . . (entities were both engaged in navigation).

Sisson, 497 U.S. at 365 n.3. The *Sisson* test was developed against the backdrop of common activities among the relevant entities and does not, on its face, address how the analysis is to be modified when the entities are engaged in different activities. *Sisson* does suggest that such refinement is necessary (497 U.S. at 365-366 nn.3-4) and, certainly, the principles discussed therein invite consideration of other criteria such as the *Kelly* factors when the circumstances dictate. The Seventh Circuit disdained this analytical flexibility. It made Great Lakes and its barge the *only* relevant entity and instrumentality in this matter and the beginning and end of its entire jurisdictional examination. Along the way, it summarily rejected consideration of *Kelly*-like factors and suggested that such an approach did not survive after *Sisson*. This is a clear conflict with the other courts of appeals which continue to use the *Kelly* test after *Sisson*.

The federal interest in the protection of maritime commerce is the driving force behind this Court's jurisdictional examination. Significantly, the naked nexus formulation developed from *Executive Jet* (but without interjection of *Kelly*-type guidelines) works best when it is least needed—in those situations where the tort claim has a traditional or

strong "maritime" flavor and for which the strict locality test would have been satisfactory:[2]

> It should be stressed that the important cases in admiralty are *not* the borderline cases on jurisdiction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the [admiralty] court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra. G. Gilmore & C. Black, *The Law of Admiralty*, 24 n. 88 (1957).

Executive Jet, 409 U.S. at 254. The courts utilizing the *Sisson* formula without explicitly relying, at least in part, on a *Kelly*-type analysis are in two categories: those with an activity before them falling "comfortably within the circle" (*see, e.g., Price v. Price*, 929 F.2d 131, 136 (4th Cir. 1991) ("core activity" giving rise to injuries derived from navigational errors, a traditional admiralty concern noted in *Foremost*); *Kelly v. United States*, 531 F.2d 1144, 1147-1148 (2d Cir. 1976) (admiralty jurisdiction proper for claim arising from U.S. Coast Guard rescue operation because agency's purpose intertwined with maritime activity); *Western*

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[2] Justice Scalia envisioned as much in his *Sisson* concurring opinion:

> The Court's statement that "the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance," . . . is neither an accurate description of the past nor a plausible prediction for the future.

497 U.S. at 371 n.2. Grubart respectfully states that it does not find Justice Scalia's alternative test to provide the better solution. The better test is one which is both practical and flexible for the myriad of situations likely to arise in the future, such as the totality of the circumstances approach.

Transport Co. v. Pac-Mar Service, Inc., 547 F.2d 97 (9th Cir. 1976) (sinking of work barge involves a traditional maritime activity, *citing Executive Jet*)); and the Seventh Circuit in this matter, willing to apply the *Sisson* nexus test mechanically without articulating a federal interest.

The *Sisson* test by itself is certainly capable of implicating such an interest when the wrong and the general activity are related to a traditional maritime activity. But, as is apparent from the opinions of the courts of appeals which continue to use a totality of the circumstances test, the scope of the examination needed to resolve the *Sisson* nexus test is not always clear cut. For example, the scrutiny called for by an incident arising out of the negligent navigation of a commercial vessel may not be identical to that required for the same incident when it is caused by the action of a stationary barge which was found to have been a vessel. To suggest otherwise is to make the existence of a vessel on navigable waters *the* controlling criteria for maritime jurisdiction. This Court explicitly rejected such a test. *Sisson*, 497 U.S. at 364 n.2. Therefore, even before one adds the complication of different types of activity among the relevant entities to the picture, it is not inconsistent for a *Sisson* examination to make use of all or part of the *Kelly* criteria.

The core of the admiralty jurisdictional inquiry is centered on the search for a federal interest in the protection of maritime commerce. Consequently, one should not have to wonder, as the Seventh Circuit did, whether a policy examination would have produced a result different from that obtained by the operative jurisdiction test. *See* 3 F.3d at 228 (use of a "[s]imilar policy analysis would likely have yielded a different result in *Sisson* itself"). Indeed, there should be a presumption that the Seventh Circuit's reasoning is flawed, no matter what jurisdiction test it used,

simply from the court's suggestion that its holding might differ had a policy analysis been included.

The *Sisson* test is only as good as the assumptions on which it is based. Mechanical application of that test in materially different circumstances will not reliably forecast the existence of a federal maritime interest any better than did the strict locality test. A totality of the circumstances examination would have forced the Seventh Circuit to confront the larger question whether a federal interest was implicated because that is one question which must be asked under such an approach. Moreover, review of the totality of the circumstances would have acted as a check on the Seventh Circuit's erroneous conclusion that the nexus prong was satisfied under the *Sisson* test, a result achieved solely by the court's mischaracterization of the "incident" and the "activity" under the *Sisson* nexus formulation. Significantly, the Seventh Circuit did not question the accuracy of the district court's analysis and holding under the totality of the circumstances test, only that it was the wrong test to use. The opposite results obtained under the two formulae indicate there is a fundamental flaw with one of them when applied to a fact situation of the type now before the Court. This Court's opinions show the flaw to be in the unquestioned application of the *Sisson* test.

B. The Differing Activities Of The Relevant Entities Require That More Than The Two *Sisson* Nexus Questions Be Asked.

After *Sisson*, it is well settled that admiralty jurisdiction demands both a maritime locality (situs) and a relationship to traditional maritime activity (nexus). This dual requirement is a development of the traditional locality test which was once the exclusive consideration. Although the locality test was easy to apply, it led to anomalous results—

admiralty jurisdiction depended simply on whether the wrong occurred on navigable waters or land with little or no regard given to the presence of a traditional maritime activity. *See generally Executive Jet*, 409 U.S. at 253 (1972). The situs test's shortcomings were substantially diminished by the Court's adoption of a nexus requirement.

This new element, the nexus component of the jurisdiction test, was refined in *Sisson* into a two-part inquiry: (1) Did the incident giving rise to the claim have the potential to disrupt maritime commerce? (2) Did the activity giving rise to the incident have a substantial relationship to maritime activity? 497 U.S. at 362-364. The Court stressed that the relevant activity must be defined "not by the particular circumstances of the incident, but by the general conduct from which the incident arose." 497 U.S. at 364. The Court did not provide further criteria for determining how to characterize the activity, but did list the different totality of the circumstances approaches utilized by the courts of appeals to determine whether an activity is substantially related to traditional maritime activity. 497 U.S. at 365-366 n.4. The Court also described the incident in a general manner:

> The jurisdictional inquiry does not turn on . . . the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the [yacht] more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.

497 U.S. at 363. Three points stand out from the Court's discussion of incident and activity: 1) they are not the same, 2) only the incident is used to assess the impact on

maritime commerce and the specific cause of the incident is irrelevant for jurisdictional purposes, and 3) the two concepts are useful because they relate to the activities and interests of all the relevant entities.

As noted in *Sisson*, after *Executive Jet*, the lower courts developed a number of criteria to evaluate the maritime flavor of a case. The Fifth Circuit took the initiative in *Kelly* and enlisted four factors to aid in establishing the relationship of the wrong to traditional maritime activity:

(1) the functions and roles of the parties,

(2) the types of vehicles and instrumentalities involved,

(3) the causation and the type of injury, and

(4) traditional concepts of the role of admiralty law.

Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1974).[3] The Fifth Circuit later refined this test based on policy guidelines distilled from *Executive Jet* and *Foremost* and added:

(5) the impact of the event on maritime shipping and commerce,

(6) the desirability of a uniform national rule to apply to such matters, and

(7) the need for admiralty "expertise" in the trial and decision of the case.

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[3] After *Sisson*, the circuit courts continued to use all or most of these factors when confronted by situations straddling the margins of admiralty jurisdiction. *See, e.g.*, *Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 654 (1994); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992).

Molett v. Penrod Drilling Co., 826 F.2d 1419, 1426 (5th Cir. 1987), *cert. denied*, 493 U.S. 1003 (1989). *See also Oman v. Johns-Manville Corp.*, 764 F.2d 224, 232 (4th Cir. 1985) (discussing same factors), *cert. denied*, 474 U.S. 970 (1985); *Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 814 (5th Cir. 1989) (there is little difference between the *Kelly* and *Molett* tests); *Shea v. Rev-Lyn Contracting Co.*, 868 F.2d 515, 518 (1st Cir. 1989) (the *Molett* elements are a "more precise enunciation of the examination specified by the fourth factor in the *Kelly* test").

The *Molett* questions relate directly to this Court's oft-stated purpose for establishing maritime jurisdiction—the federal interest in uniformity of law and remedies for all vessel operators in the promotion of maritime commerce. *See Sisson*, 497 U.S. at 367; *Foremost*, 457 U.S. at 677. Both the totality of the circumstances test and the *Sisson* test apply a policy-based analysis. The *Kelly* and *Molett* tests explicitly ask how and why maritime jurisdiction is needed to further this federal interest, whereas the *Sisson* test automatically implicates such an interest if the inquiry represented by the nexus prongs is answered totally in the affirmative. The Seventh Circuit's analysis illustrates the *Sisson* principle while its inequitable holding exemplifies the major shortcoming of the test when applied in a stripped down fashion to situations where the parties are engaged in different types of activity.

C. The Circumstances Here Do Not Implicate A Traditional Maritime Activity Requiring The Application Of Maritime Jurisdiction.

Consideration of the relevant facts of this case results in the overwhelming conclusion that this was primarily a land-based event with, at best, tangential maritime traits

and no significant federal interest to justify supplanting state law with federal admiralty law.

1. *The Functions and Roles of the Parties*

Great Lakes entered into a general construction and maintenance contract for "bridges and roads" with the City of Chicago. (J.A. 16-30). Great Lakes regularly described this contract as a "maritime contract" in the proceedings below, presumably based on its contention that the pile-driving maintenance work involved had to be performed by marine firms. Despite Great Lakes self-serving characterization, most of the contract reads like any other City of Chicago public works construction contract. It definitely is not a contract to hire a ship or its crew; nor does it fit other traditional categories of maritime contracts. *See generally Kossick v. United Fruit Co.*, 365 U.S. 731, 735-738 (1961) (describing types of maritime contractual obligations).

Before this litigation, the City's stated purpose for entering into the contract was bridge protection. (J.A. 7-15). The City's position has not changed. In contrast, Great Lakes claimed in the state-court class action suit that the purpose of the pilings was bridge protection (Pet. App. 29), but has alleged in this proceeding that the pile clusters also were designed as navigational aids and for the protection of vessels. The Seventh Circuit thought this potential (or incidental) use of the pilings was sufficient and determined that "the installation of dolphins [the pilings] relates to maritime activity." 3 F.3d at 230.

The determinative criteria for the *Sisson* activity requirement cannot depend on Great Lakes' ingenuity in identifying indirect uses for the pilings. Nor should such incidental uses transform Great Lakes' work on the pilings. Even if such uses were present here, "*importance* to mari-

time commerce is not alone sufficient to bring an activity within the scope of admiralty jurisdiction." *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 784 (11th Cir. 1984); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 644 (5th Cir. 1985). That the work relates to maritime activity is not sufficient for maritime jurisdiction to attach. *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 231 (4th Cir. 1985) (ship repair work performed by landsmen rather than seamen not a uniquely maritime service), *cert. denied*, 474 U.S. 970 (1985).

The district court properly found that the primary purpose of the pilings was the protection of the Kinzie Street bridge. The Seventh Circuit did not dispute or disturb this finding. Under *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908), the pilings were part of the land.

This debate over the primary purpose of the pilings masks the larger issue of whether Great Lakes' activity was inherently maritime in nature. The proper focus for examination of Great Lakes' activity is to be expanded beyond the "particular circumstances of the incident." *See Sisson*, 497 U.S. at 364. In *Sisson*, the storage and maintenance of vessels in a marina was the activity whereas the incident was a fire. *Sisson*, 497 U.S. at 362-363. In *Foremost*, the activity was navigation in general of vessels whereas the incident was the collision of vessels. *Foremost*, 457 U.S. at 675. It follows logically that Great Lakes' general activity was bridge construction or bridge maintenance (from a stationary barge on navigable waters) and the incident was a breach of an underground tunnel.[4]

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[4] The Seventh Circuit defined the incident posing a potential hazard to maritime commerce as "the negligent installation of (continued...)

The specific task performed by Great Lakes at the time of the alleged tort was pile driving, although Grubart, as with other damaged parties, was injured far inland and long (six months) after Great Lakes engaged in that task. Grubart and the thousands of others similarly situated were neither engaged in a maritime activity at the time of their injury nor injured on or near navigable waters. Both *Sisson* (497 U.S. at 365) and *Foremost* (457 U.S. at 674) suggest that location is important for the nexus test as well as the situs test. The Seventh Circuit invoked the Admiralty Extension Act, 46 U.S.C. § 740, in response to Grubart's argument that it suffered remote land-based injuries and that it was not engaged in a maritime activity (3 F.3d at 229 n.5). That statute, however, extends jurisdiction based only on the *locality* of the injured parties such as to a longshoreman on a dock injured by a vessel appurtenance. *See, e.g., Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). The Extension Act does not address or resolve the underlying dilemma of how the different activities of the parties affect the jurisdictional nexus inquiry.

2. *The Types of Vehicles and Instrumentalities Involved*

The vehicles and instrumentalities involved in this case were two barges, a tug, a mobile crane placed on the barge, pilings, and an underground freight tunnel. The crane was the type customarily used in land-based construction

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[4] (...continued)
pilings from barges located in the navigable channel" (3 F.3d at 229-230), and the activity as "the sinking of pilings into a riverbed." (*Id.* at 230). There is no material difference between these two events and both are wrong. The Seventh Circuit's confusion underscores the difficulty and arbitrariness possible with a sterile application of the *Sisson* three-prong test in a complicated factual situation.

activity; for this job, it rested on and worked from a stationary barge. (*See* photos at J.A. 64, 68). The barges and the tug were capable of, and allegedly were used for, transporting men and material between the different bridge jobs (and at other times unrelated to this matter) but none of the alleged wrongs can be attributed to these transportation functions. In fact, only one of the barges (the spud scow) was involved in the tunnel breach. It had no independent means of propulsion and was secured to the river floor during the pile driving with its spuds. Its role in this event can succinctly be described as a fixed work platform.

Both the district court and the Court of Appeals felt constrained to define the spud scow as a vessel because the Seventh Circuit had earlier defined a barge as a vessel for Jones Act purposes in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). *But see Sohyde Drill. & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1137 (5th Cir. 1981) (a vessel under the Jones Act is not necessarily a vessel for all other purposes, and the designation is not dispositive for determining whether it had a substantial relationship to maritime activity at the time of the incident), *cert. denied*, 454 U.S. 1081 (1981); *Ellender v. Kiva Constr. & Engineering, Inc.*, 909 F.2d 803, 806 (5th Cir. 1990) (a stationary spud barge used for pile driving was not a vessel under Jones Act); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504, 506-507 (11th Cir. 1990) (stationary spud barge not a vessel in Jones Act matter).

The district court noted that the courts were not consistent on the designation (Pet. App. 36-37), but subordinated the problem of classification to the more pertinent issue of the spud scow's function and role in contributing to the disaster. *Accord, Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538 (11th Cir. 1991) (involvement of ship is

tangential when it "does not directly affect the character of [sailor's] claims" involving lung condition from occupational exposure to chemicals used in ship maintenance), *cert. denied*, 112 S. Ct. 881 (1992); *Ellender*, 909 F.2d at 808. *See also Sisson*, 497 U.S. at 374 n.5 (Scalia, J., concurring) (the existence of a vessel in navigable water "should not be thought . . . [to] bring within admiralty jurisdiction torts occurring in navigable waters aboard any craft designed to carry people or cargo and to float. . . . The definition is not necessarily static"). It is not disputed that the barge was fixed to the riverbed during the incident and that the disaster cannot be blamed on any kind of navigational error. Moreover, the accident did not damage the barge, and was not attributable to the location of the barge or the crane. In short, the existence of the spud scow in this matter is only tangentially related to the incident and the injuries.

Similarly, there is no maritime connection with the tunnel. It is located approximately 15 feet under the river bed and is logically part of the land. *See National Union Fire Ins. Co. v. United States*, 436 F. Supp. 1078, 1081 (M.D. Tenn. 1977) (under "extension of land" doctrine, structures passing over, into, and beneath navigable waters are treated as part of mainland) (dicta). The tunnel spans approximately 47 *miles* under the City and crosses under navigable waters at only a handful of locations. The breach of the tunnel did not occur on the waters, but under the river bed.

3. *The Causation and Type of Injury*

Any analysis of a tort claim must begin with an assessment of where and how the claim originated and to whom the injury occurred. *Sisson* does not foreclose inquiry into the causation of the injury to Grubart and the other injured parties. *Sisson* does direct that the precise cause of the

injury is immaterial when defining the general character of the activity and incident:

> [T]he relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. . . . This focus on the general character of the activity is, indeed, suggested by the nature of the jurisdictional inquiry. Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question. Thus, in this case, we need not ascertain the precise cause of the fire [the incident] to determine what "activity" Sisson was engaged in.

497 U.S. at 364-365. Similarly, whether the tunnel breach turns out to be the proximate result of Great Lakes' misconduct, the City's negligent failure to maintain the tunnel,[5] or a combination thereof, is a question of causation that should not be used to "answer the legally and analytically antecedent jurisdictional question." Yet the Seventh Circuit did just that—it erroneously characterized the incident as the "negligent driving of pilings into the riverbed" (3 F.3d at 229), and further used that action as the basis for its observation that river traffic was actually disrupted (3 F.3d at 230).

The injured parties' role in the jurisdictional inquiry must consist of their connection to the asserted maritime activity. Here, that connection is indisputably the breach of

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[5] Great Lakes' admiralty complaint alleges, *inter alia*, that the City's negligent maintenance of the tunnel is the sole cause of the flood in downtown Chicago. (J.A. 34). Interestingly, the City also admits that "had the breach in the tunnel been repaired [by the City] . . . the plaintiffs would not have been injured at all." City Petition for Certiorari at 17-18.

the underground tunnel with its resultant inundation. Only that event covers all the injuries, includes all the relevant entities and instrumentalities, and does not require inquiry into proximate causation. When the parties are engaged in a different activity, and especially when the injury, as here, occurs on land, a court must expand its jurisdictional focus to include all parties and the nature and character of the injuries. The Seventh Circuit's opinion in *Sisson* suggested as much even while spurning the *Kelly* test:

> Analysis centered on how closely the source of an accident is related to "traditional maritime activity" thus seems an unproductive approach to the problem—at least in the context of accidents involving only vessels in navigable waters (*as opposed to incidents involving objects on shore*).

In re Complaint of Sisson, 867 F.2d 341, 344 (7th Cir. 1989) (emphasis added), *rev'd*, 497 U.S. 358 (1990). If the incident is the breach of the underground tunnel, it had no impact on maritime commerce, actual or potential.[6] The "actual impact" on maritime commerce to which the Seventh Circuit pointed occurred six months after the wrong in connection with a fortuitous choice of repair methods to the tunnel. As noted in *Foremost*, "[n]ot every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." 457 U.S. at 675 n.5. Repair efforts cannot demonstrate a potential impact on maritime commerce, for otherwise *every* event occurring on navigable waters would have the potential to affect maritime commerce. That would lead us back to the discredited strict locality test.

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[6] On this basis alone, even with its sterile and mechanical application of the *Sisson* test, the Seventh Circuit should have found no admiralty jurisdiction.

The Seventh Circuit committed another error in its analysis of the nexus requirement for an impact on maritime commerce. It defined the incident and the activity as the same (*see* n.4, *supra*) and thereby effectively measured the impact on maritime commerce against the activity rather than the incident. This Court did not rely on the general activity in *Foremost* (navigation) or in *Sisson* (storage and maintenance of vessels in a marina) to assess whether there was an actual or potential effect on maritime commerce. If the conduct is defined in broad, general terms—as the activity invariably is—it *always* will pose a theoretical, potential hazard to maritime commerce. Such a result would negate the need for any further inquiry and create a simple one-part *nexus* test in which a potential adverse effect on maritime commerce can simply be assumed. The Court explicitly rejected a suggestion to dispense with the impact requirement on maritime commerce. *Sisson*, 497 U.S. at 364 n.2.

The *Kelly* test makes the type of injury a relevant consideration in the jurisdictional inquiry. The character of the injury has special importance when nonmaritime activities and land-based parties are involved. Here, there is no discernible relationship between the injuries of Grubart and the thousands of other plaintiffs, and a traditional maritime activity. Grubart's land injury is not of the type expected from a maritime activity. *Compare In re Exxon Valdez*, 767 F. Supp. 1509, 1512 (D. Alaska 1991) (oil spill causes shoreline property damage); *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964) (insecurely moored ship causes bridge and other downriver structural damage), *cert. denied*, 380 U.S. 944 (1965); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204 (5th Cir. 1968) (poorly navigated vessel hits bridge), *cert. denied*, 393 U.S. 983 (1968). Moreover, the land-based injuries here were not the result of a maritime function of the instrumentalities involved. *See Victory*

Carriers, Inc. v. Law, 404 U.S. 202, 213-214 (1971) ("typical elements of a maritime cause of action are particularly attenuated" where injuries not caused by vessel's equipment or cargo). In short, this is not a question whether the type of injuries are unique to maritime activity. It is more a matter of finding *any* relation between the injuries sustained and traditional maritime activity. There is none.

4. *Traditional Concepts of the Role of Admiralty Law*

The fourth factor in the *Kelly* test is the most important. *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 231 (4th Cir. 1985); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992). The policy basis underlying the assertion of federal maritime jurisdiction is the strong federal interest in protecting maritime commerce and the need for a uniform development of laws governing all vessel operators. *Sisson*, 497 U.S. at 367; *Foremost*, 457 U.S. at 674-675, 677; G. Gilmore & C. Black, *The Law of Admiralty*, §§ 1-1, 1-5 (1975). The Seventh Circuit implied that a policy analysis had no independent role in the admiralty jurisdiction test:

> We believe that, following *Sisson*, the jurisdictional inquiry must be more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision. Similar policy analysis would likely have yielded a different result in *Sisson* itself.

3 F.3d at 228. The Seventh Circuit's refusal to engage in an explicit policy analysis left the thousands of injured parties without a role in the court's maritime jurisdictional analysis.

When substantial nonmaritime (and land-based) activities and elements are involved, as here, the putative federal

interest served by applying maritime jurisdiction must be weighed against the interests of applying the appropriate state laws. *See, e.g., Foremost*, 457 U.S. at 685 (Powell, J., dissenting) ("federalism concern is the dominating issue in the case"). *See generally* Currie, *Federalism and the Admiralty: The Devil's Own Mess*, 1960 Sup. Ct. Rev. 158 (1960). The federalism concern is adequately addressed by asking the three *Molett* questions and by faithfully adhering to the original narrow policy bases for admiralty jurisdiction discussed in *Executive Jet*, *Foremost*, and *Sisson*. As with any other policy matter, it is helpful to describe, if only by example, the types of traditional concerns of admiralty law which the federal interest presumes to protect. This Court in *Executive Jet* stated:

> Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Executive Jet, 409 U.S. at 270. Other examples abound, none of which remotely relates to the facts of this case: vessel seaworthiness actions and navigational rules (*see, e.g., Western Transport Co. v. Pac-Mar Service, Inc.*, 547 F.2d 97 (9th Cir. 1976) (capsized barge)), and injury to passengers or seamen (*see, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953)).

Foremost raised vessel navigation as a traditional maritime activity and *Sisson* did not abandon that linkage. The activity in *Sisson*—storage and maintenance of vessels in a marina on navigable waters—was deemed an "indispensable" maritime adjunct to navigation:

> At such a marina, vessels are stored for an extended period, docked to obtain fuel or supplies, and moved into and out of navigation. Indeed, most maritime voyages begin and end with the docking of the craft at a marina.

497 U.S. at 367. In contrast, the instant case involves a vessel tangentially at best (if a stationary barge acting as a work platform is a vessel), and the entire notion of navigation is antithetical to the function of the spud scow here. It contributed to the accident, if at all, as a fixed work platform rather than in the traditional maritime roles of navigation, storage and docking, and loading and unloading of cargo.

The Seventh Circuit did not discuss how the national interest would be served by applying admiralty jurisdiction. There are no technical complexities requiring a specialized maritime expertise in order fully to understand the case. This is a traditional tort action arising in negligence, so no uniform law need be applied.[7] In *Foremost*, due deference

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[7] A federal consolidated action arising out of the *same disaster* is presently pending in the United States District Court for the Northern District of Illinois (No. 93 C 1214). In connection with the court's denial of the City's motion to dismiss or stay the federal action on abstention principles, the court had this to say about the issues involved:

> The facts and issues of this consolidated federal action require for their resolution only basic principles of tort law.

In re Chicago Flood Litigation, 819 F. Supp. 762, 764 n.2. (N.D. Ill. 1993).

> Indeed, in the abstention calculus, presence of federal issues favors the exercise of federal jurisdiction. . . . In these cases, however, state law governs. . . . At its core, this litigation represents a traditional tort action.

Id. at 766.

for "uniform rules of conduct" was repeatedly stated in the context of navigation of vessels. Federal maritime interest in uniformity in areas other than navigation does exist (*see, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (extending right to recover for wrongful death under general maritime law); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 441 (5th Cir. 1991) (discussing need for uniform maritime rules regarding the duty of care owed to all persons on vessels)), but none has been raised in this matter. "The looser a legal doctrine, like that of the duty to observe 'the uniformity of maritime law,' the more incumbent it is upon the judiciary to apply it with well-defined concreteness." *Kossick v. United Fruit Co.*, 365 U.S. 731, 743 (1961) (Frankfurter, J., dissenting). Other substantial state concerns subject to being lost through admiralty jurisdiction range from the City's right to assert tort immunity under the Illinois Local Government and Governmental Employees Tort Immunity Act, 745 ILCS ¶¶ 10/1-101 to 10-101 (1992), to the right of land-based claimants to have their tort actions heard before a jury. *See, e.g., Complaint of Great Lakes Towing Company*, 395 F. Supp. 810, 813 (N.D. Ohio 1974); *Luhr Bros. Inc. v. Gagnard*, 765 F. Supp. 1264, 1267 (W.D. La. 1991). Federal intrusion should require a higher level of certitude when garden variety state tort claims and state interests dominate the litigation. These substantial legitimate state concerns should not be preempted by a nebulous federal interest.

The Seventh Circuit ignored too many competing state interests and nonmaritime indicia in running through the *Sisson* test. "Federal courts should not displace state responsibility and choke the federal judicial docket on the basis of federal concerns that in truth are only 'imaginary.' " *Foremost*, 457 U.S. at 686 (Powell, J., dissenting). The purported federal interest here is only a chimera; its existence has been assumed merely because the Seventh

Circuit found a way to answer the three *Sisson* questions affirmatively. The scope of admiralty jurisdiction should not be expanded so cavalierly into areas of traditional state common law rules of tort and contract. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211-212 (1971). Thousands of parties not remotely engaged in a maritime activity should not be subjected to federal admiralty law for claims requiring no maritime expertise and having no substantial maritime connection.

5. *Summary*

The Seventh Circuit misidentified the activity and incident under *Sisson* to reach its result. Had it properly characterized them, it would not have answered the three *Sisson* questions the way it did and it would not have found admiralty jurisdiction. The Seventh Circuit's approach shows that the *Sisson* test is susceptible to easy manipulation if the inquiry is unbending and limited to asking only three questions.

This Court has been unwilling to hold that maritime commerce embraces everything that happens on water. No federal policies underlying admiralty law are enhanced or fulfilled by its application in this matter, whose facts do not call for the application of substantive maritime legal principles. Some superficial maritime attributes may be present, but their relevance and role should be confined to the reality of the event, not inflated and extended to substantiate an imaginary federal interest. The *Kelly* test, in conjunction with the *Sisson* analysis, provides the proper perspective. The district court made the search for the federal maritime interest the touchstone of its jurisdictional inquiry, and found strong arguments against the exercise of admiralty jurisdiction under each of the *Kelly* factors:

> Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. . . . Traditional common law rules of tort and contract should do quite nicely in the resolution of the material disputes here; the specialization of admiralty rules is not necessary. The totality of the circumstances lead unyieldingly to that conclusion. Simply put, we have land-based injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and supply none of the causation for the alleged injuries.

Pet. App. 39-40.

Viewed as a whole, the circumstances of this case fail to implicate traditional maritime concepts such as seaworthiness, rights of carriage, general average, cargo damage, rights of seamen, salvage, maritime liens, and the other matters concerned with movement of persons and goods in the usual form of maritime commerce. No single factor is dispositive, but consideration of all of the facts reveals no meaningful connection among the principal activities, the injuries, and maritime commerce. Admiralty law has little expertise or interest in the traditional state tort principles which dominate this litigation.

II.

THE JURISDICTIONAL SITUS REQUIREMENT IS NOT SATISFIED BY INVOCATION OF THE ADMIRALTY EXTENSION ACT, 46 U.S.C. § 740.

The Seventh Circuit applied the Extension Act to the jurisdictional situs requirement as mechanically as it

applied the *Sisson* test to the nexus component. Under the locality test, if the tort originates on water but the substance and consummation are on land, there is no admiralty jurisdiction except through the Extension Act. 1 *Benedict on Admiralty* § 172 at 11-33 n.6 (7th ed. 1991) (citing cases); *see also Executive Jet*, 409 U.S. at 255 (*quoting Smith & Son v. Taylor*, 276 U.S. 179, 182 (1928) ("[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land")). The consummation of the tort is where it took effect. *Executive Jet*, 409 U.S. at 266; *The Plymouth*, 70 U.S. (3 Wall) 20, 34-35 (1866); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 782 (11th Cir. 1984). *See also* Sen. Rep. No. 1593, 1948 U.S. Code Cong. & Adm. News, p. 1902.

All of the injuries here occurred on land. One need only read the opening paragraph of the Seventh Circuit's opinion to gain the sense that this "leak" turned into a full scale disaster because of what happened in the downtown business district of Chicago. Similarly, it is the specter of hundreds of millions of dollars in damage claims by Loop businesses that caused Great Lakes to seek asylum by filing a complaint in admiralty. *See generally* class action complaint filed in state court (Record at 44, Tab A).

The legislative history of the Extension Act makes clear that it was designed to address the inequities and anomalies of the then-extant strict locality test.

> Under existing law, admiralty and maritime jurisdiction in respect of claims arising out of maritime torts is extended . . . to only those cases where injury is done upon navigable waters, and not to those where injury is done to persons or property situated upon land, even though the injury is caused by a vessel situated on navigable waters. For example, if a bridge or pier, or any person or property situated thereon, is in-

> jured by a vessel, the admiralty courts do not entertain the claim for the damages thus caused. . . . The bill under consideration would provide for the exercise of admiralty and maritime jurisdiction in all cases for the type above indicated.

Sen. Rep. No. 1593, 1948 U.S. Code Cong. & Adm. News p. 1899. The Extension Act itself, 46 U.S.C. § 740, provides in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

This case requires application of the Extension Act if the situs requirement is to be satisfied; the tortious conduct originated on navigable waters but the damage was felt on land. However, an underlying prerequisite to implementation of the Act is that the parties injured on land must have been damaged by a vessel or a defective appurtenance of a vessel.[8] *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973, 975 (5th Cir. 1987) (under the Extension Act, "a [party] injured on shore must allege that the injury was caused by a defective appurtenance of a ship on navigable waters"); *Pryor v. American President Lines*, 520 F.2d 974, 982 (4th Cir. 1975) ("For a ship to be responsible for injuries shore-

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[8] **Appurtenance** – **1.** Something added to another, more important thing; an appendage; accessory. **2.** *Plural.* Any equipment, such as clothing, tool, or instruments, used for a specific purpose or task; gear. . . .

The American Heritage Dictionary of the English Language (1973).

ward of the gangplank [under the Act] we think it must proximately cause injury to those ashore"), *cert. denied*, 423 U.S. 1055 (1976). *See also Victory Carriers v. Law*, 404 U.S. 202, 210-211 (the finding of jurisdiction under the Extension Act in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), "turned, not on the 'function' the stevedore was performing at the time of his injury, but, rather, upon the fact that his injury was caused by an appurtenance of a ship, the defective cargo containers. . . ."). *But see Gutierrez*, 373 U.S. at 209-210 (statute not limited to situations where "physical agency of the vessel or a particular part of it" causes the injury). There is no allegation here that the stationary barge caused the breach of tunnel located many feet under the river bed. At best, it was an arguable appurtenance to that barge, either the crane or the pile driver, that is implicated in the breach. Great Lakes has not alleged that either was defective and for this reason, the Extension Act is not available to extend jurisdiction.

Even if the Extension Act does not require that the physical agency of the vessel or a defective appurtenance must cause the injury, the inland reach of the Extension Act is not infinite. This Court discussed the logical reach of the Extension Act in *Gutierrez*. In that case, admiralty jurisdiction was applied to the claim of a longshoreman who slipped on a dock from spilled beans being unloaded from a ship. This Court held:

> We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U.S.C. § 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the *impact of which is felt ashore at a time and place not remote from the wrongful act.*

373 U.S. at 210 (emphasis added). *See also Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984) ("The cases have not developed any articulable standard by which to determine when an injury is too remote in time and place from traditional maritime activity to satisfy admiralty jurisdiction").

The Seventh Circuit misconstrued the *Gutierrez* holding by finding that the Court's reference to "remoteness" related to proximate cause rather than a limitation on jurisdiction. 3 F.3d at 229. The legislative history of the Extension Act suggests that Congress intended to extend maritime jurisdiction to shoreside damage such as to give an admiralty action to land owners whose property was damaged by a vessel on navigable waters. Illustrative examples abound in the legislative history but they revolve around problems such as bridge and pier damage by a moving vessel, and innocent owners of such land structures sustaining harm caused by a compulsory pilot on board a vessel. *See also, e.g., Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 222 (1969) (the Act provides a remedy for "parties aggrieved by injuries done by ships to bridges, docks, and the like. . . .").

These examples, when read in light of the "vessel" requirement in the Act, suggest a temporal and spatial jurisdictional limitation to the otherwise unending encroachment of maritime jurisdiction inward from the water and shore. The further one gets from navigable waters the weaker the relationship between the injuries and traditional maritime activity. Similarly, the further inland the injuries, the more likely that state and local laws are better suited to govern the asserted legal wrongs and injuries.

III.

THE TEST FOR ADMIRALTY JURISDICTION MUST WEIGH THE PUTATIVE FEDERAL INTEREST AGAINST THE STATE INTERESTS WHEN THE RELEVANT ENTITIES ARE ENGAGED IN DIFFERENT TYPES OF ACTIVITY.

The reasoning of *Sisson* is consistent with the use of the *Kelly* and *Molett* factors. *Sisson's* three-prong test follows logically from consideration of those factors. It is important to avoid a mechanical application of whatever test is used, but that is just what *Sisson* invites if characterizing the activity and incident is divorced from a *Kelly*-type inquiry. This manipulation of "generalities" and "potentialities" can be minimized by requiring *specific* identification of how a federal interest is to be advanced by the application of maritime jurisdiction. It is not enough to claim there is a federal interest in the case—what is the specific policy of uniformity or expertise that requires the application of substantive maritime law in the case? Any federalism issues will implicitly be raised by the fourth *Kelly* factor and the three *Molett* factors.

Alternatively, one can concentrate the *initial* analysis on the entities having a relation to the activity leading to the incident, much like the Seventh Circuit did. But if the relevant entities are engaged in different types of activity, the inquiry must continue. Even if a federal interest is suggested at the end of the first stage, its strength must be balanced against the competing non-admiralty interests and issues. Only by introducing the competing state interests can one determine whether the federal interest is substantial enough to invoke maritime jurisdiction. The strength of the federal maritime interest is not constant and will vary depending on the type of maritime activity identified in the first stage of the inquiry. A federal interest based on vessel navigation or another strong traditional maritime activity,

for instance, may be difficult to overcome by nonmaritime attributes and state interests. The burden of establishing and supporting the existence of a substantial federal interest in the matter should be placed squarely on the party seeking the protections of maritime jurisdiction. In the difficult case, it is invariably that party who seeks to extend the limits of admiralty jurisdiction for its personal benefit, a self-interest that rarely speaks to the national interest in protecting maritime commerce.

CONCLUSION

For all of these reasons, Petitioner, Jerome B. Grubart, Inc., urges the Court to reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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April 22, 1994

Nos. 93-762 and 93-1094

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY and
JEROME B. GRUBART, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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59 pp

QUESTIONS PRESENTED

1. Whether a federal court, in assessing whether a case in which not all parties are engaged in traditional maritime activities has a sufficient relationship to traditional maritime concerns to be a "case of admiralty and maritime jurisdiction," should consider the totality of the circumstances.

2. Whether the Admiralty Extension Act, 46 U.S.C. App. § 740, confers admiralty jurisdiction over a tort, the impact of which is felt ashore at a time and place remote from a wrongful act committed in navigable waters.

3. Whether the Seventh Circuit erred in its application of the *Sisson* test in this case.

PARTIES TO THE PROCEEDING

The petitioners in these consolidated cases are the City of Chicago and Jerome B. Grubart, Inc. The respondent is Great Lakes Dredge & Dock Company.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION, STATUTES, AND RULE:

TABLE OF AUTHORITIES—Continued

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BRIEF FOR PETITIONER CITY OF CHICAGO

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, as modified on the denial of rehearing, Pet. App. 18a-20a, is reported at 3 F.3d 225 (7th Cir. 1993). The opinion of the district court, Pet. App. at 21a-50a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1993, and modified on October 7, 1993. A petition for rehearing, filed by petitioner in No. 93-762, Jerome B. Grubart, Inc. ("Grubart"), was denied on Oc-

tober 7, 1993. Grubart's petition for a writ of certiorari was filed on November 15, 1993. The City of Chicago's petition for a writ of certiorari was filed on January 5, 1994. The petitions were granted and the cases consolidated on February 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. Art. III, § 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiciton. . . .

28 U.S.C. § 1333(1):

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. App. § 183(a):

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except [in certain cases involving loss of life or bodily injury] exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. App. § 185:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition, such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of [46 U.S.C. App. § 183], or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of [46 U.S.C. App. § 183]. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. App. § 740:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

STATEMENT

A freight tunnel system ("the tunnel") runs beneath the downtown district of the City of Chicago ("the Loop") and crosses under the Chicago River near the Kinzie Street Bridge. In May 1991, the City entered into a contract with respondent Great Lakes Dredge & Dock Company ("Great Lakes"), pursuant to which Great Lakes was to remove and replace the piling clusters at five bridges in the river, including the Kinzie Street Bridge. J.A. 16-30. The contract obligated Great Lakes to familiarize itself with the surface and subsurface conditions at the work site (J.A. 22-23) and warned Great Lakes not to drive the pilings "at any other location than that specified by the City. The position of the piles shall not be changed to any degree, as even slight position changes may cause serious damage to various underground . . . structures." J.A. 28. The contract further provided that "[s]hould the contractor damage any of these . . . structures through carelessness or improper positioning he will be obliged to repair such damages . . . at his own expense." J.A. 28.

Great Lakes performed the work provided for in the contract from two barges. J.A. 32-33, 48-50, 55-67. The barges functioned as stationary work platforms and had no means of locomotion aboard; they were taken to a worksite by tugboats and then secured. J.A. 32-33, 48-50, 55-57. Notwithstanding the provisions of the contract, Great Lakes installed the pilings at the Kinzie Street Bridge "in a location other than originally designated in its Contract with the City" (R. 44, Exh. A. at ¶ 18), allegedly with the approval of the City officials supervising the project. J.A. 33. Great Lakes completed the work in September 1991. J.A. 32-33.

On April 13, 1992, more than six months later, the tunnel collapsed near the Kinzie Street Bridge. Pet. App. 21a. Water from the Chicago River entered the tunnel, and numerous buildings in the Loop connected to the tunnel were flooded. Pet. App. 21a-22a. Tens of thousands of businesses and individuals who work and live in the Loop have filed more than fifty class-action and individual lawsuits against the City and Great Lakes in the Circuit Court of Cook County, Illinois, alleging that Great Lakes tortiously damaged the tunnel while pile driving and that the City tortiously failed to repair the tunnel in the months before the tunnel flooded. Pet. App. 22a-23a. Grubart, petitioner in No. 93-762, is a member of the plaintiff class that has been certified in the consolidated state-court actions. The state-court plaintiffs allege that they were injured both by the tunnel flood and by the subsequent decision to interrupt electrical service to the area. The remedial measures that were used to repair the breach in the tunnel ultimately caused the Chicago River to be temporarily closed to vessels (Pet. App. 2a n.1), although none of the plaintiffs in the consolidated class action alleges injury because the River was closed. Plaintiffs claim hundreds of millions of dollars in damages. The state-court defendants—the City and Great Lakes—also sought contribution from each other in proportion to the responsibility of each for plaintiffs' damages.

On October 6, 1992, Great Lakes filed a petition in the district court pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 181 *et seq.*, which entitles the owner of a vessel to limit its liability for property damage incurred without the privity or knowledge of the owner of the vessel to the value of the owner's interest in the vessel. *Id.* § 183(a). In its petition, Great Lakes sought exoneration from or limitation of any liability it may incur from claims arising out of the tunnel flood. Great Lakes denied that its pile-driving activities had caused the flood, but sought limitation of whatever liability it may have on the basis that the pile driving had taken place from barges that were floating in navigable waters. J.A. 34-37. Great Lakes also sought indemnity and contribution from the City should Great Lakes be held liable to any of the plaintiffs. J.A. 37-40. Great Lakes posted a bond in the amount of $633,940, representing the value of the vessels it used in the Kinzie Street Bridge project, and hence the maximum amount that could be recovered against it should its defense under the Limitation Act be sustained. R. 3 (attachment).

On motions of the City and Grubart, the district court dismissed the petition for lack of subject matter jurisdiction and for failure to state a claim. Pet. App. 21a-50a. Applying the test articulated in *Sisson v. Ruby*, 497 U.S. 358 (1990), the court held that it lacked admiralty jurisdiction over Great Lakes' petition because there was no substantial relationship between the activity giving rise to the incident and traditional maritime activity. The court concluded:

> In summary, the relevant facts alleged to be present in this now historic calamity to our city do not involve traditional maritime concerns. Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this special-

> ized set of rules. Traditional common law rules of tort should do quite nicely here; the specialization of admiralty rules is not necessary. The totality of the circumstances lead[s] unyieldingly to that conclusion. Simply put, we have land-based injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and suppl[ies] none of the causation for the alleged injuries. There are not traditional maritime concerns present here, and, without [them], no admiralty jurisdiction.

Pet. App. 37a-38a.[1]

In reaching its decision, the court applied the totality of the circumstances test derived from the Fifth Circuit's decision in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974), and noted by this Court in *Sisson*, 497 U.S. at 365 n.4. See Pet. App. 32a-33a. *Kelly* outlined four factors for the court to consider in determining whether there is a nexus between the events underlying a case and traditional maritime activity: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. See 485 F.2d at 525.

The Seventh Circuit reversed, holding that there was jurisdiction, and remanded the case for further proceedings. Pet. App. 1a-15a. The court of appeals held that the district court had erred in using *Kelly*'s totality of the circumstances test to determine whether admiralty jurisdiction existed. Pet. App. 6a-7a. Instead, the court stated that *Sisson* required it to limit its analysis:

> After *Sisson*, in ascertaining the existence of admiralty jurisdiction we ask three questions about the incident giving rise to the alleged wrong: (1) did it

[1] In addition, the court found that Great Lakes' petition failed to state a claim upon which relief could be granted because Great Lakes was foreclosed, as a matter of law, from limiting its liability under the Limitation Act. Pet. App. 43a-49a.

> occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity?

Pet. App. 6a.

Using this test, the Seventh Circuit began with the locality requirement and held that the alleged tort in this case was "the negligent driving of pilings into the riverbed" (Pet. App. 7a-8a) and that this wrong had occurred in navigable waters. Pet. App. 8a. The City had argued (Pet. App. 8a) that the site of the injury in this case—flooding of buildings in the Loop—was on land, at a time and place too remote from Great Lakes' alleged wrongful conduct to satisfy the locality requirement. Relying on the Admiralty Extension Act, 46 U.S.C. App. § 740, the court below rejected this argument:

> We believe that the requirement of temporal proximity is nothing more than a specialized rule of proximate causation. And we do not believe that the elapse of six months, the period of time between Great Lakes' completion of its work and the flood, bars application of the Admiralty Extension Act.

Pet. App. 8a. The court held that the incident in this case satisfied the locality requirement of admiralty jurisdiction. Pet. App. 9a.

Turning to the nexus requirements, the court examined first whether the incident posed a potential hazard to maritime commerce. The court concluded that the installation of pilings in the Chicago River did pose such a hazard "[b]ecause commerce on the river was *actually* disrupted for more than a month." Pet. App. 10a (emphasis in original). Next, the court considered whether the activity in which Great Lakes was involved was substantially related to traditional maritime activity. The court concluded that sinking pilings in the Chicago River was related to maritime activity because one purpose of the pilings was to aid navigation. Pet. App. 10a-11a.[2]

[2] The court of appeals also concluded that Great Lakes' defense under the Limitation Act raised issues of fact, and thus its petition

SUMMARY OF ARGUMENT

Grubart and the other state-court plaintiffs sought to recover from the City and Great Lakes by asserting that their property—basements and other property throughout the Loop—was tortiously damaged by the negligence of Great Lakes and the City. In this action, Great Lakes seeks to obtain an adjudication of this controversy in federal court under federal admiralty law, thus preempting plaintiffs' and the City's state law rights—as well as the City's state-law defenses to Great Lakes' contribution and indemnity action against it—by arguing that this dispute falls within the district court's exclusive admiralty jurisdiction.

1. The fundamental purpose of federal admiralty and maritime jurisdiction is to ensure that those engaged in maritime activities need not be cognizant of and comply with a variety of state and local laws as they sail through multiple jurisdictions, nor fear the consequences of encountering vessels from other jurisdictions that would not be familiar with local laws if they governed navigation and similar maritime endeavors. Thus, federal admiralty jurisdiction displaces state tort law, and supplies uniform federal rules of decision, for cases in admiralty arising from maritime torts. This case does not implicate that purpose, and the propriety of litigating it in federal court under federal rules of decision is far from clear. The asserted legal wrong for which plaintiffs seek to recover—flooding of downtown basements—did not occur on navigable waters. Neither did the City's allegedly negligent failure to repair the tunnel with sufficient speed. When parties make intentional decisions to venture onto (or at least near) navigable waters, it may well be fair that they be held to the federal rules of decision that have long governed there, at least when they cause injury on or near the water. Grubart and the other plaintiffs, however, had little reason to know that their right to recover for the flooding of their basements would hinge on the vagar-

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should not have been dismissed for failure to state a claim. See Pet. App. 11a-15a.

ies of admiralty law, including the Limitation of Vessel Owner's Liability Act.

More important, the State of Illinois has interests here in ensuring that land-based parties (such as Grubart), who have never engaged in maritime activities, receive adequate compensation for legal wrongs done them, and in defining the tort immunities that determine the magnitude of the legal exposure that local governments in Illinois (and their taxpayers) face. The legitimate state interest in controlling liability rules governing land-based parties is unquestionably substantial. Precisely for this reason, in *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), this Court warned that when an effort is made to extend admiralty jurisdiction to land-based injuries, the courts "should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Id.* at 212. State tort law should accordingly not be preempted by an exclusive federal remedy unless some federal interest justifies such a significant intrusion into the States' traditional prerogative to control the tort remedies available to land-based parties.

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court held that when an injury occurs on navigable waters and involves only parties engaged in maritime activities, federal jurisdiction is present if the incident giving rise to the injury poses a potential hazard to maritime commerce, and the activities giving rise to the incident have a substantial nexus to traditional maritime concerns. See *id.* at 363-64. The Court left open, however, the question what jurisdictional test should be used in a case involving parties not engaged in traditional maritime activities. See *id.* at 365 n.3. In this case, even assuming that Great Lakes was engaged in maritime activities, many of the City's activities (such as the actions it took to operate and repair the tunnel) were not traditional maritime activities, and certainly Grubart (a Loop shoe store) was not engaged in any maritime ac-

tivity. This case thus presents the issue that was reserved in *Sisson*.

In any case in which a party to a state-court tort action attempts to deprive another party of its state-law rights and remedies by invoking exclusive federal admiralty jurisdiction, the party invoking federal jurisdiction must establish at the outset that the case is one of "admiralty and maritime jurisdiction" within the meaning of the Constitution and the pertinent jurisdictional statutes. Even in cases of tortious injury occurring solely on navigable waters, and involving only parties engaged in maritime activities, this Court has insisted on a nexus to traditional maritime concerns before the case may properly be considered in "admiralty and maritime jurisdiction." Here, however, an even more serious question arises, precisely because Great Lakes seeks to preempt the state-law rights of land-based parties. When a case has both maritime and nonmaritime parties and elements, the threshold jurisdictional inquiry should be whether these land-based aspects of the case that ordinarily are governed by state law can be subjected to admiralty jurisdiction. If the land-based aspects of the case dwarf the significance of its maritime aspects, then surely the case should not be considered one of "admiralty and maritime jurisdiction."

In a case involving parties that were not engaged in maritime activities, *Sisson* does not provide the appropriate test. The *Sisson* tes' does not purport to consider the interests of parties not engaged in maritime activities or the interests of the States in adjudicating cases involving land-based injuries. In contexts where parties seek preemption of the state-law rights of others, the Court asks whether some federal interest justifies intruding upon matters otherwise properly left to state tort law. The same inquiry is appropriate here. To determine whether the case can be considered a maritime tort—thus importing into the case the specialized admiralty rules of decision—the Court should assess the competing federal and state interests at stake.

Under the inquiry we urge, this is not a case of federal admiralty jurisdiction. There is no evidence of congressional intent to extend admiralty jurisdiction to a case involving parties not engaged in maritime activities. And federal law does not regulate the type of pile driving Great Lakes performed. Preserving state-court jurisdiction would not subject Great Lakes to conflicting, nonuniform, or uncertain legal obligations. None of the parties to this case was actually involved in navigation, and thus none needs the protection of uniform federal rules. Great Lakes bid on a contract to do work at fixed locations from stationary—albeit floating—work platforms. That contract warned Great Lakes that its work could damage underground structures. It was always clear that Illinois law—and only Illinois law—would apply if there were state claims resulting from that work. Moreover, Great Lakes could have built into its bid price whatever risks such state-law liability might pose if it damaged land-based entities. In short, there is no federal interest sufficient to limit the state-law rights of plaintiffs, or the state-law defenses available to the City in Great Lakes' contribution and indemnity action, in order to protect the free flow of maritime commerce. Without such a federal interest, there can be no admiralty jurisdiction.

2. Even if this were a "case of admiralty and maritime jurisdiction" as the Court has construed that phrase, jurisdiction still requires a statutory basis. It is settled that the grant of admiralty jurisdiction to district courts found in 28 U.S.C. § 1333(1) does not reach cases involving damage on land caused by negligent conduct occurring on navigable waters. That is accomplished, if at all, by the Admiralty Extension Act, which provides that admiralty jurisdiction "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740. The court of appeals read this statute to permit the exercise of federal jurisdiction as long as plaintiffs' injuries were proximately caused by conduct occur-

ring on navigable waters. The flaw in this approach is identified by *Sisson* itself, which teaches that the jurisdictional inquiry should not be merged into the merits of proximate causation. See 497 U.S. at 365. Indeed, if the jurisdictional test were dependent on proximate causation, then presumably a federal court could not definitively assess its jurisdiction until after discovery and trial. And if a plaintiff failed to establish proximate causation, the justification for asserting federal jurisdiction over the action (and for preempting state-law remedies) would disappear at that time. To avoid such anomalous results, this Court has never permitted the existence of federal jurisdiction to turn on the merits of the underlying claim.

Instead of merging the inquiry concerning jurisdiction into the merits, this Court's cases suggest that a special rule of proximate causation should be applied under the Extension Act, to ensure that jurisdiction can be ascertained without fact-intensive inquiries. Such a rule also ensures that state law is not displaced without sufficient justification. Under this rule, federal courts should refuse to entertain claims of proximate causation under the Extension Act when the land-based injury occurs at a time and place remote from the alleged negligence occurring on navigable waters. See *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210 (1963). If an injury is that remotely linked to negligence on navigable waters, then a claim of proximate causation is too fact-intensive and intrudes too substantially on matters traditionally left to state tort law. In such cases, the exercise of federal jurisdiction is unwarranted.

3. Even if the Court rejects the jurisdictional inquiry that we believe is necessary in a case such as this—involving land-based parties and injuries—and concludes that *Sisson* supplies the correct test for assessing federal jurisdiction, the Seventh Circuit erred in its application of that test. That court misapprehended the proper inquiry under *Sisson* by focussing on the alleged cause of the incident rather than on the general features of the incident itself.

As we explain above, *Sisson* rejected inquiry into causation at the jurisdictional stage. Thus, the incident for purposes of the *Sisson* inquiry is the injury for which recovery is sought—in this case, the flooding of basements in the Loop—and not its alleged underlying cause, which may or may not have been pile driving in navigable waters. The flooding of Loop buildings, of course, poses no potential hazard to maritime commerce, and thus cannot support the exercise of federal jurisdiction. Similarly, adherence to *Sisson*'s admonition against inquiry into causation requires the conclusion that the activity giving rise to the incident does not bear a substantial relationship to traditional maritime concerns. Again, there has been no finding—and Great Lakes hotly disputes—whether it had anything to do with the flooding of the tunnel. The activity that damaged the plaintiffs—regardless of its underlying cause—was the manner in which the tunnel was maintained. And the manner in which the City operated the tunnel has no nexus to maritime concerns, and affords no basis to convert this state tort action into one governed by exclusive federal jurisdiction.

ARGUMENT

I. THE TOTALITY OF CIRCUMSTANCES ESTABLISHES THAT THERE IS NO ADMIRALTY JURISDICTION IN THIS CASE.

The Constitution provides that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Congress has bestowed that power on the federal district courts in 28 U.S.C. § 1333, which provides in part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." The Admiralty Extension Act, in turn, provides that this "admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwith-

standing that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740.

Both Article III and these jurisdictional statutes refer to "admiralty and maritime jurisdiction," but neither the Constitution nor the statutes define what that phrase means. While the outer boundaries of an "admiralty or maritime" case are nowhere expressly stated, that does not mean that none exists. Plainly, at some point a case has so little relation to admiralty and maritime concerns that a court cannot fairly characterize it as an "admiralty and maritime" case within the meaning of the Constitution and the pertinent statutes.[3] Indeed, this Court held just that in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), when it concluded that admiralty jurisdiction did not reach a case arising from an airplane crash into navigable waters because the case had no meaningful nexus to the traditional maritime concern for protecting water-borne commerce. See *id.* at 268-73.

The question how to define an admiralty case is of considerable practical importance as well, because it determines the rules of decision to be applied. Section 1333(1) grants exclusive jurisdiction to federal district courts over cases of "admiralty and maritime jurisdiction," and thus divests the state courts of the jurisdiction they would otherwise exercise, subject only to the "savings to suitors" clause.[4] Moreover, if a tort action is held to fall within

[3] Indeed, the Court has observed that the Constitution limits Congress's ability to characterize a given controversy as a "case of admiralty and maritime jurisdiction":

> [T]here are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing clearly without.

Panama R. Co. v. Johnson, 264 U.S. 375, 386-87 (1924). See also, *e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959); *In re The Thomas Barlum*, 293 U.S. 21, 44 (1934); *Crowell v. Benson*, 285 U.S. 22, 55 (1932).

[4] The "savings to suitors" clause permits a state court to exercise jurisdiction over an in personam admiralty action as long as it applies the substantive federal law of admiralty. *E.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986). The "savings to suitors" clause has limited application to this case, however, because Great Lakes has filed a petition under the Limitation Act, which provides that a vessel owner may petition a "district court of the United States of competent jurisdiction" for a limitation of liability, and once the owner has deposited security equal to the value of the vessel, the court must enjoin all other proceedings. See 46 U.S.C. App. §§ 183, 185; Fed. R. Civ. P. Supp. F.

federal admiralty and maritime jurisdiction, admiralty law will displace the operation of state law, since courts sitting in admiralty must apply federal rules of decision. See, *e.g., East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *Executive Jet*, 409 U.S. at 255. In particular, it has long been settled that once a case is characterized as arising from a tort on navigable waters, liability is to be determined under federal and not state rules of decision. *E.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628-29 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-46 (1942).

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court held that a two-part nexus test for admiralty jurisdiction applies, in addition to the locality test, when recovery is sought for an injury occurring on navigable waters: whether the incident giving rise to the injury has a significant potential to disrupt commercial maritime activity and whether the activity giving rise to the incident bears a substantial relationship to traditional maritime concerns. See *id.* at 363-65. That test is sufficient in cases in which all parties are engaged in maritime activities. In such a case, the parties have fair notice that their activities may well be governed by federal law, and the interests of the States in regulating land-based activities are not implicated. Thus the jurisdictional issue is appropriately limited to whether the case has a nexus to the federal interest in protecting the free flow of maritime commerce.

When, as in this case, parties not engaged in traditional maritime activity are present—indeed where the claims

arise from injuries occurring on land—a different question arises: whether admiralty jurisdiction can be extended to parties not engaged in maritime activities, who suffered land-based injuries, and whose legal rights are traditionally governed by state law. Indeed *Sisson* expressly left open the appropriate jurisdictional test in a case involving both maritime and nonmaritime parties: "Different issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely raises them." 497 U.S. at 365 n.3.

In cases presenting the question reserved in *Sisson*, the Court should not base its jurisdictional inquiry on whatever particular "activity" and "incident" may have occurred on navigable waters. An inquiry so confined gives no weight to the interests of land-based parties or to the interests of the States in adjudicating claims of land-based injury under state law. Instead, a court should assess the federal and state interests in adjudicating the underlying controversy to determine if there is a sufficient federal interest to justify displacing the state-law rules of liability by which land-based entities are ordinarily governed. That inquiry looks not merely at what occurred on navigable waters, but instead requires an examination of the totality of the circumstances (see *Kelly*, 485 F.2d at 525), and is compelled by the need to ensure that maritime interests are sufficiently strongly implicated that the case can properly be considered within the "admiralty and maritime jurisdiction."

A. Admiralty Jurisdiction Is Defined With Reference To The Federal Interest In Protecting Maritime Commerce.

Traditionally, admiralty jurisdiction over tort cases was confined to circumstances in which the wrong occurred on navigable waters. See *Executive Jet*, 409 U.S. at 253-54. Under this "locality" test, both the allegedly negligent conduct and its harmful effects must take place afloat; federal

jurisdiction did not extend to water-borne tortious conduct causing damage on land. *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), contains the classic formulation of the locality rule: "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction." *Id.* at 35.[5]

Dissatisfied with the results sometimes dictated by strict application of the locality test, the Court has moved to limit admiralty jurisdiction over tort cases that otherwise met the locality test but had no connection to traditional maritime activities. See *Executive Jet*, 409 U.S. at 255-56, 268. In *Executive Jet*, a commercial airplane, while taking off from Cleveland's airport, struck a flock of seagulls, causing the plane to crash in the waters of Lake Erie. The owners of the airplane brought suit against various defendants for allegedly having caused the crash, asserting jurisdiction under 28 U.S.C. § 1333(1). See 409 U.S. at 250-51. The Court held that a case growing out of an airplane crash on navigable water, although satisfying the locality test, is not a "maritime tort." *Id.* at 268. Rather, to be cognizable in admiralty, "the wrong [must] bear a significant relationship to traditional maritime activity." *Ibid.*

In determining whether the tort at issue had such a relationship to traditional maritime activity, the Court in *Executive Jet* examined the fundamental purpose of admiralty law and asked whether that purpose required the assertion of federal jurisdiction over the airplane crash. The Court concluded that because admiralty law was de-

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[5] See also *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 340 (1973); *Executive Jet*, 409 U.S. at 253-54; *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205-07 (1971); *Martin v. West*, 222 U.S. 191, 197 (1911); *The Troy*, 208 U.S. 321, 323 (1908); *Cleveland Terminal & Valley R. v. Cleveland S.S. Co.*, 208 U.S. 316, 319-20 (1908).

signed to accommodate the unique problems posed by vessels at sea, there was no nexus when a tort arose from an airplane crash. See 409 U.S. at 269-71. The Court also considered whether the state courts could deal satisfactorily with the issues presented by the airplane crash. See *id.* at 272-73. That Ohio courts "could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors" (*id.* at 273) was another factor in determining that there was no admiralty jurisdiction over suits arising from the plane crash.

In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), the Court made clear that this policy-based analysis of admiralty jurisdiction applied even to cases traditionally at the heart of admiralty jurisdiction—cases involving tortious injury allegedly resulting from the activities of a vessel plying navigable waters. *Foremost* arose out of a collision between two pleasure boats. The Court nevertheless refused to base jurisdiction solely on the commission of a tort occurring on a vessel on the water, holding that *Executive Jet*'s requirement of "a significant connection with traditional maritime activity" would apply in all cases. See 457 U.S. at 673-74 & n.4. In applying the nexus requirement to that case, the Court in *Foremost* again relied, as in *Executive Jet*, on the purpose of the substantive body of admiralty law. The Court rejected the argument that "traditional maritime activity" meant only vessels themselves engaged in commercial maritime activity, because operators of pleasure boats who do not comply with the uniform set of rules applicable to commercial vessels jeopardize maritime commerce. See *id.* at 674-75.

Most recently, the Court refined the nexus test in *Sisson v. Ruby*, 497 U.S. 358 (1990). *Sisson* arose from a fire caused by a defective washer/dryer on a pleasure boat docked in a marina: the fire spread to other vessels and the marina itself. The Court rejected the argument that any actionable conduct occurring on a vessel in navigable waters was an admiralty case:

> [T]he demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far. In *Foremost*, the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction.

Sisson, 497 U.S. at 364 n.2 (emphasis in original). Instead, the Court formulated a nexus test that asks whether the incident giving rise to the injury has a significant potential to disrupt maritime commerce and whether the general characteristics of the activity giving rise to the incident bear a substantial relationship to traditional maritime activities. See *id.* at 363-65. The Court concluded that the nexus test was satisfied because a fire at a marina has a significant potential to disrupt maritime commerce, and the manner in which boats are stored at a marina has a substantial relationship to traditional maritime concerns. See 497 U.S. at 363-67.

This trilogy of cases, in particular, highlights the nature of the interest in asserting federal admiralty jurisdiction: protection of maritime commerce through uniform rules of decision. As vessels traverse navigable waters, they cannot be required to learn the differing local laws that might otherwise apply at each point in their journey, nor should they have to risk encountering vessels that may be unfamiliar with applicable local rules relating to navigational concerns. In *Executive Jet*, for example, the Court wrote that admiralty law is

> designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to

> determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

409 U.S. at 269-70. In *Foremost*, the Court focussed on this same interest:

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. . . . The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

457 U.S. at 674-75 (emphasis in original) (footnote omitted). Accord *Sisson*, 497 U.S. at 367 (rules governing storage of vessels on navigable waters must be uniform to protect maritime commerce).

The Court has identified this same federal interest—the need to protect maritime commerce through application of uniform federal rules of decision—in admiralty cases litigated in state courts under the "saving to suitors" clause of Section 1331(1). It is well settled that a state court sitting in admiralty may " 'adopt such remedies, and . . . attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.' " *American Dredging Co. v. Miller*, 114 S. Ct. 981, 985 (1994) (quoting *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954), in turn quoting *Red*

Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924)). In determining what features of state law may permissibly be applied in admiralty cases the Court asks whether a state law rule " 'works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relationships.' " *American Dredging*, 114 S. Ct. at 985 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917)). Accord, *e.g.*, *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-40 (1961); *Davis v. Department of Labor & Industries*, 317 U.S. 249, 254 (1942). See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system" (footnote omitted)).

Thus, the need to protect maritime commerce through uniform federal rules of decision is the touchstone for determining the scope of federal jurisdiction. In a wide variety of cases involving only parties engaged in maritime activities, this federal interest amply justifies displacing state law. For example, if Great Lakes had negligently placed a piling in a navigable channel, where a vessel subsequently struck it and was damaged, the nexus to the federal interest in applying uniform rules that protect the free flow of maritime commerce would plainly be sufficient under *Sisson* to allow the exercise of federal jurisdiction. But as we note above, and indeed as the Court itself recognized, *Sisson* involved only parties engaged in maritime activities. See 497 U.S. at 365 n.3. In cases in which the interests of land-based parties are at stake, however, the federal interest in protecting maritime commerce will not always justify preempting the causes of action, and the defenses, otherwise available to land-based litigants under state law. As we now explain, the *Sisson* test does not help sort out these cases.

B. The *Sisson* Test Cannot Properly Determine Admiralty Jurisdiction In A Case In Which Not All Parties Are Engaged In Traditional Maritime Activity.

Even if we assume that the court of appeals correctly concluded that Great Lakes was engaged in traditional maritime activities, this case raises precisely the question left open in *Sisson*.[6] Many of the City's activities relevant to this case, such as its decisions about how to maintain, inspect, and repair the tunnel, were not traditionally maritime activities. And certainly Grubart, a Loop shoe store, was not engaged in any maritime activity.

The Court in *Sisson* was correct to reserve the question whether the two-part nexus test was appropriate for cases in which not all parties were engaged in maritime activities. The propriety of characterizing such a case as one of "admiralty and maritime jurisdiction" is open to serious doubt. The farthest inland that this Court has ever permitted admiralty jurisdiction to extend is to the portions of the shore that are hazards to navigation, such as bridges, or that are customarily used to service, load, and unload vessels. See generally *Victory Carriers*, 404 U.S. at 207-12; *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360 (1969). Thus there is no decision of this Court that supports the radical expansion of admiralty jurisdiction countenanced by the court of appeals.

There is also reason to doubt the fairness of such a radical expansion of admiralty jurisdiction landward. When parties have made an intentional decision to venture onto (or at least near) navigable waters and engage in maritime activities, they can fairly be held to the uniform federal rules of decision that have long governed there, at least when they cause injury on or near the water. Parties who make no such choice, however, have little, if any, opportunity to conform their conduct to the requirements of that law, or to obtain insurance or make

[6] We do not, of course, agree with the Seventh Circuit's application of the *Sisson* test to this case. See Part III, *infra*.

other decisions about liability risks in light of the prevailing rules of admiralty. Hence the propriety of applying those rules to such parties is highly doubtful. Cf. *Wilburn Boat Co. v. Firemen's Fund Insurance Co.*, 348 U.S. 310, 316-21 (1955) (refusing to apply federal admiralty law to maritime insurance contracts, in part because the public has long acted on the assumption that state law governs marine insurance).

Here, plaintiffs in the consolidated state-court action seek recovery not for any injury occurring in navigable waters, but for flooding of building basements in downtown Chicago. They had little if any notice that federal rules of decision, such as the Limitation Act, would be applied to actions involving damage to their property, and thus little opportunity to purchase maritime insurance or otherwise make arrangements in light of these rules of federal law. The same is true of City officials who made decisions about how to maintain public property and insure against the risk of liability; they are ordinarily entitled to rely on the protections contained in the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS paras. 10/1-101 to 10-101 (1992).

The assertion of federal admiralty jurisdiction over this case will dramatically affect the rights of land-based parties not engaged in maritime activities that they would otherwise enjoy under state law. Plaintiffs seeking to recover against Great Lakes will confront its defense under the Limitation Act. And the City, in asserting its state-law tort immunity defenses, will confront the decision in *Workman v. Mayor of New York*, 179 U.S. 552 (1900), in which the Court refused to recognize state-law immunity defenses to a maritime tort in order to preserve the uniformity of federal admiralty law. Thus, characterizing flooding of building basements in the Loop as a maritime tort has serious implications for the legal rights of land-based parties.

Recognizing admiralty jurisdiction in cases involving land-based parties and activities also has serious federal-

ism implications. This Court has repeatedly recognized the States' legitimate and weighty interests in ensuring that plaintiffs receive adequate compensation for land-based injuries. See, *e.g.*, *English v. General Electric Co.*, 496 U.S. 72 (1990).[7] Conversely, the States also have a substantial interest in limiting plaintiffs' rights, should they decide to do so, by defining the scope of the tort liability to which local governments (and their taxpayers) are exposed. In Illinois, for example, state law affords immunity to local governments and their officials for decisions involving the exercise of judgment. This limitation on tort liability has been recognized in order to prevent undue supervision of public officials by the judiciary through the vehicle of tort litigation. See, *e.g.*, *Kennell v. Clayton Township*, 606 N.E.2d 812, 817-18 (Ill. App. 1992); *Fryman v. JMK/Skewer, Inc.*, 484 N.E.2d 909, 911-12 (Ill. App. 1985); *Williams v. Board of Education*, 367 N.E.2d 549, 555 (Ill. App. 1977).[8] This Court has itself acknowledged the importance of this governmental interest when construing the analogous tort immunity of

[7] Indeed, the Court has acknowledged the legitimate interest of the States in adequately compensating their residents even in cases of maritime torts; it has held that state wrongful death and survival of actions statutes should be applied in admiralty when they do not alter the substantive law of admiralty or deprive a vessel owner of its defense under the Limitation Act. See *Just v. Chambers*, 312 U.S. 383, 387-92 (1941); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 241-42 (1921); *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398, 405-06 (1907).

[8] *Fryman* considers the common-law limitations on the tort duties of local governments under Illinois law. *Kennell* and *Williams* construe section 2-201 of the Tort Immunity Act, which provides:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS para. 10/2-201 (1992). The City and the state-court class action plaintiffs like Grubart are currently litigating the applicability and scope of this and other state-law tort duties and immunities. *In re Chicago Flood Litigation*, No. 93-0207 (Ill. App. Ct.).

the United States provided by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2860(a). As the Court has written, that tort immunity "'prevent[s] "judicial second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quoting *United States v. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

Ordinarily, of course, in cases involving land-based injuries, state courts and legislatures enjoy the prerogative of balancing plaintiffs' interests in compensation against defendants' interest in some type of limitation on or immunity from tort liability. Sweeping such cases into federal admiralty jurisdiction, with its uniform federal rules of decision, accordingly has profound implications for the States because it deprives them of the power they otherwise would have to determine the liability rules governing land-based injuries.[9]

In short, once this case is characterized as within the admiralty jurisdiction of the district court, the rights and defenses of land-based parties become subject to federal statutory and common law doctrines, such as the Limitation Act and *Workman*—presumably the very reasons that Great Lakes has sought admiralty jurisdiction. And while federal courts may apply state-law rules of decision to supplement federal rules when they do not alter substantive federal admiralty law, see, *e.g.*, *Romero*, 358 U.S. at 373-74, leaving the accommodation of state inter-

[9] As one commentator has noted:

> The question of the extent of the jurisdiction of the United States admiralty courts is important to the subject of federalism in maritime law for the obvious reason that a case that is not within the ambit of that jurisdiction is, ipso facto, not a potential source of the kind of federal-state jurisdictional conflict in question. Even more significant, however, is that fact that the ambit of the admiralty jurisdiction and the reach of applicability of the substantive maritime law are, in the large, coextensive.

David W. Robertson, *Admiralty and Federalism* 121 (1970).

ests to choice-of-law analysis is an entirely unsatisfactory solution, for at least two reasons.

First, any effort to preserve state-law rules of decision within admiralty jurisdiction "is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986) (referring to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). And, as we explain at the outset of this discussion (see pp. 14-15, *supra*), once this case is characterized as a maritime tort within federal admiralty jurisdiction, liability is adjudicated under federal standards. In admiralty law, a determination that there is jurisdiction thus dictates the rules of decision and leaves little room to depart from the Limitation Act or *Workman*.

Second, whatever decisions there are to make within federal admiralty jurisdiction about the rules of decision will, of course, no longer be made by state courts and legislatures. It will be the federal courts that decide what, if any, state-law rules of decision to apply.[10] Thus in determining the rules of decision that will govern cases involving land-based parties and injuries, an impact on the interests of the States is inevitable, regardless of what choice-of-law decisions the federal courts ultimately make.[11]

The court of appeals relied on *Sisson* to reject any inquiry into the legitimate state interests compromised by an assertion of federal jurisdiction, or whether there was any federal interest in supplying uniform rules of decision was implicated here. The court held: "We believe that,

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[10] Even in cases tried in state courts under the "saving to suitors" clause, state courts will not be free to use state choice-of-law principles because of the "reverse *Erie*" doctrine requiring conformance to federal standards of liability.

[11] See generally Robertson, *supra* note 9, at 278 ("a sensible reworking of the jurisdictional scheme . . . would have important and salutary effect on the choice of law problem").

following *Sisson*, the jurisdictional inquiry must be much more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision." Pet. App. 7a. This was error. The *Sisson* test cannot properly determine admiralty jurisdiction in cases in which not all parties are engaged in traditional maritime activities. In such cases, as the *Sisson* Court noted, the courts of appeals had employed the *Kelly* test (the same test used by the district court here). See 497 U.S. at 365-66 n.4. *Sisson* did not reject that test for cases involving nonmaritime parties; as we note above, the Court reserved decision on what test to use in such cases. See *id.* at 365 n.3. In *Sisson*, the Court held only that "at least in cases in which all of the relevant entities are engaged in similar types of activity (cf. n.3, *supra*), the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance to the federal courts." *Id.* at 366 n.4.

Sisson should not be extended to cases involving nonmaritime parties because there is no place in the *Sisson* test for a consideration of the competing concerns raised when land-based claims are adjudicated in a federal admiralty court. The two nexus questions asked in *Sisson* accommodate neither the legitimate interests of land-based parties nor the federalism implications of resolving those parties' claims and defenses under federal admiralty law. That is understandable: the *Sisson* test was expressly crafted for cases involving only parties engaged in maritime activities arising from injuries occurring on navigable waters. But application of that test where only one party has engaged in activities on navigable waters that have a nexus to maritime concerns sets at nought the legitimate interests of nonmaritime parties, and of the States in controlling liability rules for nonmaritime parties. The appropriate jurisdictional test in cases in which not all parties are engaged in maritime activities must take into account the interests of nonmaritime parties and the legitimate interests of the States

in applying their common and statutory law to land-based parties and injuries as well.[12]

C. A Substantial Federal Interest In Protecting Maritime Commerce Is Required To Preempt The State-Law Rights Of Parties Not Engaged In Maritime Activities.

When the Court has considered whether to extend the reach of admiralty jurisdiction inland, it has examined the strength of the pertinent state interests to determine whether federal admiralty jurisdiction exists. In *Victory Carriers*, for example, a longshoreman was injured on a pier while driving a forklift to move cargo for eventual loading onto a ship. Rejecting an argument that the case fell within federal admiralty jurisdiction by virtue of Section 1333 and the Admiralty Extension Act, the Court wrote:

> We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.

[12] As one commentator has written:

> The maritime nature of an occurrence does not deprive a state of its legitimate concern over matters affecting its residents or the conduct of persons within its borders; but the federal admiralty powers were granted to protect certain federal interests in maritime and commercial affairs. An issue created by such a conflict of interests can be resolved only by reference to those interests and by an attempt to maximize the effectuation of the proper concerns of both state and nation.

David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 Sup. Ct. Rev. 158, 169; see also Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 257, 277 (1950) (noting that tortious injury by a maritime object to a non-maritime object creates difficult problems "not because of any metaphysical constructions as to tort 'locality' but because there is a legitimate state interest in the safety of property ashore.").

404 U.S. at 211-12. Thus, the Court concluded:

> "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined."

Id. at 212 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).[13]

The Court has also accommodated the legitimate state interest in adjudicating land-based claims when it has considered the related question whether the substantive law of admiralty preempts state regulatory statutes. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), for example, the Court held that admiralty law did not preempt a Florida statute governing liability for the costs of oil spills. See *id.* at 340-44. The Court

[13] The result in *Victory Carriers*—that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, did not apply to a longshoreman who was injured on land by land-based equipment while participating in loading a ship—has been legislatively overruled by the 1972 amendments to the Act. See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 260-64 (1977). Congress expanded the geographical coverage of the Longshoremen's Act landward by defining as part of "navigable waters" docks and other property customarily used to load and unload ships, but limited application of the Act to those engaged in maritime employment. See 33 U.S.C. §§ 902(3), 903. That legislation, however, did not alter the Admiralty Extension Act. *Victory Carriers* thus remains good law as a construction of the Extension Act and as a statement of the scope of admiralty jurisdiction. See *Askew*, 411 U.S. at 340-41 & n.11.

observed that "[h]istorically, damages to the shore or to shore facilities were not cognizable in admiralty" (*id.* at 340), and cited *Victory Carriers* for the proposition that admiralty jurisdiction should be extended inland only "with caution." *Id.* at 341. The Court found no federal interest in regulating these spills sufficient to overcome the weighty state interest in protecting its coast. See *id.* at 341-44.

Similarly, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that state prosecutions against ships for violating a local smoke abatement ordinance were not preempted by federal admiralty jurisdiction because the legislation fell within traditional local police powers, and the Court could identify no federal interest in uniformity that justified preemption of this traditional local authority. See *id.* at 442-48. See also *Kelly v. Washington*, 302 U.S. 1, 13-15 (1937) (upholding state regulation of unsafe tugboats because it was an exercise of traditional police powers and there was no federal interest in imposing uniform rules).[14]

Thus the substantial state and local interests at stake when the admiralty jurisdiction and state-court jurisdiction collide are ones to which the Court has long been sensitive. Because the result of recognizing admiralty jurisdiction in this case is to displace plaintiffs' state-law rights and the City's state-law defenses, the need to balance federal and state interests is the same here as in other types of preemption cases. These concerns mandate a test for the assertion of admiralty jurisdiction when not all parties are engaged in maritime activity that properly takes account of those interests.

As the Court recognized in *Victory Carriers*, *Askew*, and *Huron Portland Cement*, liability rules for injuries

[14] See generally *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U.S. 455, 461-67 (1886) (upholding state quarantine law applied to vessels arriving in port); *Packet Co. v. Catlettsburg*, 105 U.S. 559, 561-65 (1881) (upholding local regulation of steamboat landings).

occurring on land have traditionally been set by state tort law. When the Court considers preemption in non-admiralty cases in the absence of express congressional guidance or occupation of an entire regulatory field,[15] the Court has presumed that there should be no preemption in areas traditionally governed by state and local law, and has permitted preemption only if there is a " 'clear and manifest' " federal interest in supplanting state law sufficient to overcome that presumption. *English*, 496 U.S. at 79 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). See also, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-19 (1992); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-56 (1984). Such a federal interest is present only when "it is impossible for a private party to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The same balancing of federal and state interests is called for here. Indeed, such a balance of interests is compelled by this Court's admiralty decisions as well, which repeatedly counsel that the jurisdictional inquiry cannot be divorced from the purposes that support the exercise of jurisdiction. See *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2076 (1991); *Sisson*, 497 U.S. at 364 n.2.[16]

[15] Here, as we explain above, neither a statute nor the Constitution defines the phrase "admiralty and maritime jurisdiction," and this Court's admiralty preemption cases such as *Victory Carriers*, *Askew*, *Huron Portland Cement*, and the others we cite above make clear that Congress has not occupied the field of wrongful conduct occurring on navigable waters.

[16] See also *American Dredging*, 114 S. Ct. at 990 (Souter, J., concurring) ("how a given rule is characterized for purposes of determining whether federal law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce"); *id.* at 992 (Stevens, J. concurring in part and concurring in the judgment) (arguing that admiralty preemption should be measured by the

Accordingly, when an effort is made to extend admiralty jurisdiction to parties and activities that have traditionally been governed by state law, the inquiry should not be governed by *Sisson*. Rather, in cases involving land-based parties and injuries, a federal court should satisfy itself that the totality of the circumstances reflects a federal interest in protecting maritime commerce sufficiently weighty to justify shifting what would otherwise be state-court litigation into federal court under the federal law of admiralty. This inquiry is faithful to admiralty law's purpose—to protect maritime commerce—while at the same time taking account of the competing federal and state interests in adjudicating claims involving both maritime and nonmaritime parties, activities, and injuries.[17]

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same preemption principles "as in cases involving nonmaritime subjects"); *id.* at 995 (Kennedy, J., dissenting) (arguing that admiralty preemption should be measured by the federal interest in promoting "comity and trade. The States are not free to undermine these goals . . . .").

[17] Our analysis is substantially the same as that of the four dissenters in *Foremost* and as the *Kelly* test used by the district court. Of course, *Foremost* involved only parties engaged in maritime activities on navigable waters, and the majority rejected the test for that reason. See 457 U.S. at 674-75. The *Kelly* test, as we explain above, looks to the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and traditional concepts of the role of admiralty law. See *Kelly*, 485 F.2d at 525. While we have endeavored to formulate the test with somewhat more precision than *Kelly* did, that test as well looks to the totality of the circumstances to determine whether the federal interest in applying uniform rules of decision is implicated by the case. See, *e.g.*, *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538 (11th Cir. 1991), cert. denied, 112 S. Ct. 881 (1992); *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 440 (5th Cir. 1991). The district court, when it applied the *Kelly* test, correctly took account of the totality of the circumstances and concluded that there was no sufficient federal interest to justify an exercise of admiralty jurisdiction in this case. See Pet. App. 32a-33a, 37a-38a. Indeed, it was precisely this aspect of the district court's analysis to which the court of appeals objected. See Pet. App. 7a.

D. The Federal Interest In Adjudicating This Controversy Is Insufficient To Justify Adjudicating The Rights Of Land-Based Litigants In Federal Court.

The presence of land-based parties, activities, and injuries in this case means that it has a substantial nonmaritime element over which Great Lakes seeks to have a federal admiralty court assert jurisdiction. As we explain above, because parties not engaged in maritime activities, as well as claims arising from land-based injuries, are traditionally governed by state law, federal jurisdiction must be based on a showing that there is a federal interest in protecting maritime commerce present. Or, to state the point in the terms that the Court has used in its preemption jurisprudence, preserving state-court jurisdiction must "stand[] as an obstacle" to achieving the federal interest in protecting maritime commerce. *See English*, 496 U.S. at 79. As applied to this case, that inquiry involves three particular questions—first, whether there is any evidence of congressional intent to assert a federal interest in federal adjudication of this type of case; second, whether there is a risk that Great Lakes will be subject to conflicting, nonuniform, or uncertain obligations if state jurisdiction is not displaced; and third, whether state-court jurisdiction will otherwise burden maritime commerce.

1. There is no evidence of congressional intent to bring this type of case within federal jurisdiction. As we note above, neither Section 1333(1) nor the Admiralty Extension Act defines a "case of admiralty and maritime jurisdiction," so there is no express congressional determination that controversies involving parties not engaged in maritime activities should be resolved in federal court.[18]

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[18] The Admiralty Extension Act merely extends "admiralty and maritime jurisdiction," whatever that is, to certain land-based injuries. The Act does not define what types of actions should be considered cases of "admiralty and maritime jurisdiction" in the first instance. Rather, it means only that if a case otherwise falls within "admiralty and maritime jurisdiction," the exercise of federal jurisdiction will not be defeated solely because the injury occurs on part of the shore that is traditionally considered part

Nor do Great Lakes' activities relevant to this case fall within any area in which Congress has legislated. The conduct, for example, is not related to navigational concerns, such as those embodied in the Rules of the Road, 33 U.S.C. §§ 2001-73. Indeed, we are aware of no federal statute or regulation providing standards for the pile driving that Great Lakes here performed—in particular, no federal rules govern how to drive or replace pilings so that underground structures are protected.[19]

2. An assertion of federal jurisdiction is unnecessary to protect Great Lakes from conflicting, nonuniform, or uncertain obligations. There is no risk at all that state and federal law will subject Great Lakes to conflicting obligations if state-court jurisdiction is preserved. Either federal or state jurisdiction, but not both, will ultimately be upheld; and, in this case, whichever court takes the matter will apply its own law. Thus, if there is no federal jurisdiction, the federal common law of admiralty will impose no obligations on Great Lakes. Nor does any other aspect of federal law impose obligations on Great Lakes. Again, we are not aware of any statute or regulation that addresses the work Great Lakes performed or the tort it allegedly committed. With no evidence that the federal government actually regulates its conduct under the contract at issue, Great Lakes is poorly positioned to argue that state and federal law subject it to conflicting obligations. Cf. *Davis*, 317 U.S. at 256-58 (refusing to find federal preemption of state workers' compensation law for employee drowned when he fell from barge, in part be-

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of land—such as a pier, dock, or bridge. See, *e.g.*, *Victory Carriers*, 404 U.S. at 209-12 & n.8. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 221-23 (1969); *Rodrigue*, 395 U.S. at 356. We discuss the language and purpose of the Extension Act in greater detail in Part II below.

[19] The City informed the United States Coast Guard of the piling replacement project at issue. That agency advised that the City would need a federal permit only if it employed steel rather than timber pilings. The City chose timber pilings and was subject to no further federal review or permit requirements. J.A. 46.

cause federal law did not appear to regulate his employer); *Kelly v. Washington*, 302 U.S. at 13-14 (refusing to find state tugboat regulation preempted, in part because no federal regulation of tugboats existed).

Nor does Great Lakes need access to federal court to protect it from a risk that its conduct would be governed by nonuniform state liability regimes. As we explain above, the need for uniform rules for seaworthiness, navigation, and the activities that can affect them is the federal interest that traditionally justifies the assertion of admiralty jurisdiction. The federal interest is thus at its nadir when these activities are not involved. Here, these concerns are not in fact involved. Great Lakes' pile driving did not call into question the seaworthiness of its barges. Nor did Great Lakes' pile driving implicate navigational concerns: Great Lakes' admiralty petition does not seek exoneration or limitation with respect to any claim that its allegedly wrongful conduct on navigable waters obstructed navigation. The contract, moreover, required Great Lakes to replace pilings in precisely the same location as they had been in, locations that had proved over the years not to interfere with navigation. State courts adjudicating this case thus need evaluate only Great Lakes' care with respect to underground structures, and not its compliance with rules governing navigation or seaworthiness. Cf. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 421-23 (1985) (injury to worker on oil drilling platform in navigable waters does not fall within admiralty jurisdiction because platforms were not involved in navigation and "were not even suggestive of traditional maritime affairs"); *Rodrigue*, 395 U.S. at 360-61 (oil drilling platforms are not within admiralty since "[t]hey were islands, albeit artificial ones"). The court of appeals certainly identified no need for or federal interest in supplying a uniform federal rule to guide the use of stationary platforms to perform pile driving to replace pilings in the same exact location. In fact there is no federal interest. Only the City, its Loop residents and businesses, and its taxpayers had an interest in what Great Lakes did and how it did it.

There is also no danger of varying state and local rules governing Great Lakes' pile driving. Here, the contract required pile driving in one identified, stationary location—the Chicago River. Great Lakes, in carrying out its pile-driving contract, operated its "vessels . . . as fixed platforms . . . not involved in navigation." Pet. App. 37a. There thus was never any possibility that Great Lakes' pile driving would fall under more than one regime of law administered by different state courts. Grubart and other plaintiffs did not have their choice among state courts; Great Lakes was not at risk that plaintiffs could successfully forum-shop.

Finally, the assertion of state-court jurisdiction in this case will not subject Great Lakes to uncertain obligations or otherwise undermine the federal interest in protecting maritime commerce through readily ascertainable rules of decision. Great Lakes performed pile-driving services for the City pursuant to a contract that required it to place pilings at fixed locations in the Chicago River and warned of the possible presence of underground structures. In determining the degree of care to exercise in performing the pile driving, Great Lakes could easily ascertain Illinois law on liability for damaging underground structures. In contrast, no federal standards relating to such structures exist. Thus, Great Lakes knew precisely what it was to do, at precisely which locations, and could readily identify the State's law that would apply and what that law was.

3. Preservation of state-court jurisdiction would not otherwise burden maritime commerce. As we have just explained, the pile-driving activities here did not implicate navigational concerns or whether Great Lakes' barges were seaworthy according to maritime custom. As we note above, Great Lakes' admiralty petition does not seek exoneration or limitation on any claim that its conduct obstructed navigation or otherwise presented a hazard to maritime commerce or those engaged in maritime activities. Rather, Great Lakes has sought to limit its liability (and the City's state-law defenses) with respect to land-based injuries. Because none of the parties was actually

involved in navigation, the federal interest in supplying uniform rules of decision to ensure that maritime commerce is unimpeded is not present. Cf. *Executive Jet*, 409 U.S. at 268-72 (airplane crash did not fall within admiralty jurisdiction because airplanes are not engaged in maritime navigation and thus have no nexus to maritime concerns); *Rodrigue*, 395 U.S. at 360-61 (oil drilling platform was not involved in navigation and hence did not fall within admiralty jurisdiction).

Moreover, the burden of state liability rules will not fall on pile-driving contractors such as Great Lakes even if their conduct is adjudicated by state courts. Great Lakes was on notice not only of the precise locations where it was to perform its work, but also of the existence of nearby underground structures. Great Lakes could readily (and presumably did) protect itself against whatever risks state tort law might present by adjusting its bid price, purchasing insurance, demanding indemnification, or making similar arrangements. Thus, Great Lakes could have passed on to the City whatever risks state-supplied rules of liability imposed. For this reason, Great Lakes has no need for the protection of federal rules of decision to avoid the economic burdens that state law imposes for any land-based damages that it caused. Federal admiralty law should not step in after the fact to provide Great Lakes with the protection it could have secured for itself.

In short, requiring Great Lakes to defend itself in state court against parties who suffered land-based injuries poses no threat of impeding the flow of maritime commerce. State courts can assess Great Lakes' liability for land-based injuries "without any effect on maritime endeavors." *Executive Jet*, 409 U.S. at 273. There is, in particular, no federal interest in providing uniform rules to govern the standard of care for Great Lakes' pile-driving activity —especially as it relates to underground structures—and that is the federal interest on which admiralty jurisdiction is founded. On the other hand, there is a strong interest in allowing the plaintiffs and the City to rely on the

rights, liabilities, and defenses, afforded under Illinois tort law. A case involving liability for the flooding of basements in the Chicago Loop is not a federal admiralty case.[20]

II. THE ADMIRALTY EXTENSION ACT DOES NOT CONFER ADMIRALTY JURISDICTION OVER THIS CASE.

Even if this were a case of "admiralty and maritime jurisdiction" as the Court has construed that phrase, some statute must still be identified that confers jurisdiction on the district court. It is quite clear that 28 U.S.C. § 1333(1) is not such a statute. As we explain above, Section 1333(1) has never extended admiralty jurisdiction to damage caused on land. To be within the scope of Section 1333(1), standing alone, the tortious injury complained of has to occur on navigable waters. Under Section 1333(1), "[t]he Court [has] refused to permit recovery in admiralty even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks, or other shore-based property." *Victory Carriers*, 404 U.S. at 209. See also *Executive Jet*, 409 U.S. at 253-55.

Here, because the injuries complained of are land-based, Section 1333(1) standing alone does not reach this case. Thus, if a district court is to exercise "admiralty and maritime jurisdiction" over this case, it must be by virtue of the Admiralty Extension Act, which provides that "admiralty and maritime jurisdiction . . . shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740.

[20] Of course, there will be cases when the federal interest is sufficiently weighty to justify the exercise of federal jurisdiction over claims arising from land-based injuries. For example, if one of Great Lakes' tugboats had struck a City bridge, damaging one of Grubart's trucks then on the bridge, the claims of Grubart and the City against Great Lakes—although arising from land-based injuries to nonmaritime parties—would fall within admiralty jurisdiction because of the strong federal interest in supplying the body of law that governs vessels engaged in navigation.

The court of appeals thought that as long as the plaintiffs' injuries were proximately caused by Great Lakes' alleged negligence, the Extension Act supplied federal jurisdiction here. See Pet. App. 8a-9a. But *Sisson* holds that jurisdictional statutes should not be read to collapse a federal court's jurisdictional inquiry into the merits of proximate causation: "Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." 497 U.S. at 365. This holding is sound. Merging a federal court's jurisdictional inquiry into the merits creates serious practical problems. If a court cannot decide whether it has jurisdiction until it decides the question of proximate causation, then it cannot determine whether it has jurisdiction over the matter until after discovery and trial. And then, if the trier of fact rejects proximate causation, the justification for exercising federal jurisdiction, and, in turn, for preempting state tort remedies and trying the case in federal court, disappears.

Thus, jurisdictional statutes should not be construed in a manner that makes jurisdiction turn on the merits of proximate cause. This case illustrates the paradox involved in trying to resolve the merits of the causation issue in order to determine the jurisdictional issue. Great Lakes' complaint lays claim to admiralty jurisdiction on the ground that it has been sued by parties that allege that it caused the flooding of the Loop and the injuries complained of there. J.A. 33-35. At the same time, however, Great Lakes alleges that, on the merits, it was blameless for the flood and that the City is solely responsible for causing plaintiffs' damages. J.A. 34. And if Great Lakes proves just that at trial, then there will be no basis for exercising federal jurisdiction over this case under the Extension Act, for Great Lakes will have disproved the existence of any federal interest in asserting

jurisdiction over this case and shifting litigation over proximate causation—and all other issues—from state to federal court.

Sisson is not the only occasion on which this Court has disapproved of merging the jurisdictional inquiry with the merits. The seminal case on this point is *Bell v. Hood*, 327 U.S. 678 (1946). There the Court refused to hold that a district court lacked federal question jurisdiction over a complaint because it might not state a claim on the merits: "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Id.* at 682. Thus the rule has emerged in federal question cases that as long as a complaint is not wholly frivolous on its face, it is sufficient to confer jurisdiction under 28 U.S.C. § 1331. See, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 768 (1993); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70-71 (1978); *Hagans v. Lavine*, 415 U.S. 528, 542 n.10 (1974); *Baker v. Carr*, 369 U.S. 186, 199-200 (1962); *Romero*, 358 U.S. at 359; *Bell v. Hood*, 327 U.S. at 682-83.

Theoretically, the Extension Act could be read in the same way that *Bell v. Hood* read Section 1331: admiralty jurisdiction could be recognized in every case in which a nonfrivolous claim of proximate causation is asserted, even if the claim later proves unfounded. Although possible, such a rule should be rejected because it would have very different consequences in the context of admiralty jurisdiction than in the context of federal question jurisdiction. Recognizing federal question jurisdiction does not preempt any state-law rights otherwise available to the parties—Section 1331 supplements rather than replaces the state tort law. See, *e.g.*, *Monroe v. Pape*, 365 U.S. 167, 183 (1961). By contrast, assertion of federal admiralty jurisdiction deprives parties of their state-law rights. Admiralty jurisdiction, therefore, should not be based on a claim of proximate causation that, al-

though nonfrivolous, may well prove insubstantial. As we explain above, this Court, in assessing federal admiralty jurisdiction, has long been sensitive to the serious federalism implication of such preemption.

In particular, in *Victory Carriers*, the Court refused to construe the Extension Act to confer admiralty jurisdiction over a suit by a longshoreman injured on a pier while moving cargo to be loaded on a ship. "[S]tate law has traditionally governed accidents like this one" where the longshoreman was injured on land. 404 U.S. at 212. A broad construction of the Extension Act "would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state workmen's compensation statutes." *Ibid.* Thus, the Court recognized that it "should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Ibid.* See also *Askew*, 411 U.S. at 340-44 (holding that the Extension Act did not preempt Florida law governing liability for oil spills because this would invade traditional state police powers). Here, similar federalism problems would arise if nonfrivolous but ultimately insubstantial claims were to enable state-court defendants such as Great Lakes to circumvent state-law tort liability rules.

Moreover, to permit federal courts to exercise admiralty jurisdiction based only on a nonfrivolous claim of proximate causation—thereby moving litigation over proximate causation and all other aspects of the merits from state to federal courts without a finding by the trier of fact that jurisdiction in fact exists under the Extension Act—could well exceed Congress's authority to displace state tort law. In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court held that the Longshoremen's and Harbor Workers' Compensation Act could not constitutionally apply to an employee absent a finding that he was injured on navigable waters; without such a finding, Congress lacked the constitutional power to transform the liability proceeding into a federal case in admiralty. See

id. at 54-56.[21] Under *Crowell*, a construction of the Extension Act that would permit the assertion of federal jurisdiction based solely on a nonfrivolous claim of proximate causation—without a finding that the land-based injury was actually caused by conduct occurring on navigable waters—would raise serious constitutional questions. And *Crowell* also teaches that jurisdictional statutes should be construed to avoid raising these constitutional problems. See *id.* at 62-63.

Finally, permitting extension of admiralty jurisdiction to land-based injuries simply because the claim that they are linked to conduct occurring on navigable waters is not wholly frivolous would create myriad practical problems. Parties seeking to take advantage of more favorable admiralty rules of decision would doubtless construct increasingly more bizarre theories of causation, presenting federal courts with new legal quagmires as they try to determine how unlikely a claim of causation must be before it is frivolous. In addition, as each claim was sustained, parties would become emboldened to march ever farther inland with their so-called admiralty cases. Accordingly, "[a]ffirmance of the decision below would raise a host of new problems as to the standards for and limitations on the applicability of maritime law to accidents on land." *Victory Carriers*, 404 U.S. at 214 (footnote omitted).

Instead, a construction of the Extension Act is required that avoids both the problems inherent in merging the jurisdictional inquiry into the merits of proximate causation and the equally serious problems inherent in permitting the assumption of federal jurisdiction based merely on a nonfrivolous claim of proximate causation. The Court's decision in *Gutierrez v. Waterman Steamship*

[21] While statements in *Crowell* concerning the right to trial de novo on an administrative agency's findings of jurisdictional fact have fallen into disrepute, its holding concerning the constitutionally permissible scope of federal admiralty jurisdiction continues to be treated as good law. See, *e.g.*, *United States v. Raddatz*, 447 U.S. 667, 682-83 & n.9 (1980).

Corp., 373 U.S. 206 (1963), suggests the appropriate test. There the Court concluded that admiralty jurisdiction was properly invoked pursuant to the Extension Act over the claim of a longshoreman who slipped on beans that had spilled on the dock while the vessel was being unloaded in navigable waters. The Court held:

> We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U.S.C. § 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and *the impact of which is felt ashore at a time and place not remote from the wrongful act.*

Id. at 210 (emphasis supplied) (footnote omitted). Under this construction of the Extension Act, there is a special rule that precludes jurisdiction in cases raising close questions of the proximate causation of injuries that are remote from conduct occurring on navigable waters. The remoteness rule provides a jurisdictional test that does not depend on fact-intensive inquiries that can be made only after discovery and trial, or on claims of causation that may well prove to be ultimately meritless.

The construction of the Extension Act embraced in *Gutierrez* is plainly correct. The statutory text nowhere defines what types of claims of causation will be sufficient to fall within the Act, nor does it define how close the relationship must be between activity on navigable waters and a land-based injury to make the case one of "admiralty and maritime jurisdiction." The Act's purpose, however, makes clear that only a modest expansion of jurisdiction was intended. As this Court explained in *Victory Carriers*, the Act was intended to repudiate the result of cases holding that admiralty jurisdiction did not provide a remedy for damage done by ships on navigable waters to structures on the shore. See *Victory Carriers*, 404 U.S. at 209 & n.8. See also *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 221-23 (1969); *Rodrigue*, 395 U.S. at 360; S. Rep. No. 1593, 80th Cong., 2d Sess. 2

(1948); H.R. Rep. No. 1523, 80th Cong., 2d Sess. 2 (1948).[22] Thus we think it significant, and appropriate, that *Gutierrez* described the Extension Act as reaching cases of injuries "ashore," and not "inland." Even then, jurisdiction is limited to injuries occurring "at a time and place not remote from the wrongful act." 373 U.S. at 210.

The court of appeals rejected our argument that the land-based injuries in this case were too remote in time and place from any wrongful act on navigable waters, ironically because it construed this Court's holding in *Gutierrez* as "nothing more than a specialized rule of proximate causation." Pet. App. 8a. But the court of appeals then did not apply a "specialized rule"; rather, it held that there was federal jurisdiction as long as the plaintiffs' injuries were alleged to have been caused by conduct occurring on navigable waters. There is nothing "specialized" about such an inquiry; indeed it is the same inquiry as in any case in which proximate causation is an element. Thus, the decision below converts this aspect of *Gutierrez* into a dead letter. And there is a valuable role for the *Gutierrez* rule: it avoids invoking federal jurisdiction in cases in which the merits of proximate causation are likely to raise difficult and fact-intensive issues.

Accordingly, claims of proximate causation under the Admiralty Extension Act should be rejected as insufficient

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[22] There is no indication in this legislative history of Congress' intent to extend admiralty jurisdiction to cover nonmaritime parties injured on land by a chain of events ultimately traceable to an accident on water. Moreover, there is no indication that the two organizations principally advocating adoption of the Act, the American Bar Association and the Maritime Law Association of the United States, contemplated that the Act would reach so far. See Lawrence Bogle, *et al., Report of the Committee on Admiralty and Maritime Law*, 60 Rep. A.B.A. 411-14 (1935); Charles Hickox, *et al., Report of the Committee on Admiralty and Maritime Law*, 56 Rep. A.B.A. 311-15 (1931); T. Catesby Jones, *et al., Report of the Committee on Admiralty and Maritime Law*, 55 Rep. A.B.A. 303-13 (1930). See also Proc. Mar. L. Ass'n, doc. no. 234 at 2455-59 (1937); Proc. Mar. L. Ass'n, doc. no 225 at 2339 (1936).

when it cannot confidently be said that the land-based injury occurs "at a time and place not remote from the wrongful act" on navigable waters. In our view, a claim will be remote when the land-based injury does not occur reasonably contemporaneously with negligent conduct occurring on navigable waters and when the injury occurs at a place farther from navigable waters than the reach of the vessel, its appurtenances, and cargo. This test is manageable and appropriately respectful of both the federal and state interests involved.

Applying that test to this case, it is plain that the damage complained of here—the flooding of buildings in the Loop more than six months after the completion of the alleged maritime activity—falls outside the reach of the Admiralty Extension Act. *Victory Carriers* held that even the injuries suffered by a longshoreman while driving cargo to a point at which it was to be loaded onto a vessel, caused by the alleged unseaworthiness of the vessel and the negligence of its owner, were too remote to be within the Extension Act. See 404 U.S. at 211-14. Here the impact of Great Lakes' activities was felt inland at a time and place far more remote from any act in navigable waters. This type of claim of proximate causation accordingly supplies an insufficient basis to warrant the exercise of admiralty jurisdiction.

III. THERE IS NO ADMIRALTY JURISDICTION IN THIS CASE UNDER THE *SISSON* TEST.

If this Court rejects our argument that the *Sisson* test should not be used to determine whether there is admiralty jurisdiction in this case, the Seventh Circuit's application of the *Sisson* rule should still be reversed. Even a straightforward application of the jurisdictional test set forth in *Sisson* establishes that there is no admiralty jurisdiction over this case. Although purporting to apply the *Sisson* test, the court of appeals actually distorted it in fundamental ways. The Seventh Circuit's exclusive focus on Great Lakes' pile-driving activities—and its refusal to consider the land-based aspects of the case—was not faithful

to *Sisson*'s admonition that a court should not identify the underlying cause of a maritime tort in order to determine whether federal jurisdiction exists.

The test announced in *Sisson* requires consideration of (1) whether "the general features of the type of incident involved [make the] incident . . . likely to disrupt commercial [maritime] activity" (see 497 U.S. at 363), and (2) whether "the activity giving rise to the incident" bears a "substantial relationship" to "traditional maritime activity" (see *id.* at 364). With regard to the first part of the *Sisson* test—"the general features of the type of incident involved"—this Court in *Sisson* described the incident as "a fire that began on a noncommercial vessel at a marina located on a navigable waterway." *Id.* at 362. The Court wrote that a federal court should look not to the underlying cause of the incident, but rather only at characteristics of the incident itself—the particular event that tortiously damaged the plaintiff. The jurisdictional inquiry should not "turn on the particular facts of the incident in this case, such as the source of the fire." *Id.* at 363. Instead, the incident was what actually caused tortious damage to property—in that case, "a fire on a vessel docked at a marina on navigable waters." *Ibid.* The court concluded that is the type of incident likely to disrupt commercial maritime activity. See *ibid.*

Here, the tortious injury of which the plaintiffs complain—and which Great Lakes argues is cognizable only in a federal admiralty court—is water damage to their basements. Under *Sisson*, that is the "incident" relevant to the jurisdictional analysis. But the flooding of downtown basements hardly poses a likelihood of disrupting maritime commerce.

The Seventh Circuit went astray because it attempted to identify not the "incident," but "the incident giving rise to the alleged wrong." Pet. App. 6a. Thus, the court focussed on the cause of the incident and not the incident itself. This distinction is crucial. In this case, it is the difference between the allegedly tortious flooding of land

and the cause of that flooding, which the court below identified as "the installation of pilings from barges." Pet. App. 9a. *Sisson* explicitly rejects any consideration of the cause of the incident. See 497 U.S. at 363. Thus, the "general features of type of incident involved" in this case—determined by reference to the tortious injury to the plaintiffs, rather than its cause—can only be accurately identified as the flooding of building basements in a downtown business district.[23]

The error of the court of appeals' approach is easily seen by reference to *Sisson* itself. Under the Seventh Circuit's test, the Court in *Sisson* would have been concerned with the cause of the fire, not the fire itself. But as we explain above, the *Sisson* Court rejected inquiry into the underlying cause of the fire. Indeed, under the Seventh Circuit's test, *Sisson* would have come out the other way; this Court would not likely have concluded that the cause of the fire—a defective washer/dryer unit—posed a potential hazard to commercial maritime activity. This shift in focus by the court below also skews the outcome in this case: the installation of pilings from barges has the potential to disrupt maritime commerce; the flooding of building basements plainly does not.

The court of appeals observed that efforts to repair the tunnel breach had resulted in a month-long closing of the Chicago River, which in turn disrupted maritime commerce. See Pet. App. 10a. But that was not the "incident" that damaged these plaintiffs. If Great Lakes had been sued by vessel owners unable to move in maritime commerce because of its alleged negligence, the court of appeals' characterization of the "incident" might be correct. But this case involves only flooding of land-based property. That incident poses no likelihood of disrupting maritime commerce.

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[23] Indeed, the court below seemed to recognize that the incident was the flooding when, in discussing the second prong of *Sisson*, it attempted to ascertain "Great Lakes' activity at the time it allegedly caused, or precipitated the flood. . . ." Pet. App. 10a.

With regard to the second part of the *Sisson* test—whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity—*Sisson* teaches "that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." 497 U.S. at 364. The Court again disclaimed inquiry into causation, writing that it "need not ascertain the precise cause of the fire to determine what 'activity' Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters." *Id.* at 365. Thus, it is the activity that tortiously damaged the plaintiffs, and not its "precise cause," that is relevant under *Sisson*.

On this prong as well, the court of appeals erred. The court identified "Great Lakes' activity at the time it allegedly caused, or precipitated, the flood as . . . the sinking of pilings into a riverbed," and held that this activity was substantially related to traditional maritime activity. Pet. App. 10a. Again, however, the Seventh Circuit's focus on the pile driving incorrectly embroiled the court in questions of causation. We do not yet know in this case what caused the flooding of the tunnel. Great Lakes, of course, denies that its conduct was in any way the cause. J.A. 34, 37, 39. Thus, rather than embark on the speculative inquiry what conduct caused the flooding of the tunnel, the court should have focussed on what allowed the water from the tunnel to enter plaintiffs' property. This, after all, was the tort of which plaintiffs complain—the flooding of their property. The activity that gave rise to the flooding of plaintiffs' property from the flooded tunnel was the manner in which the tunnel had been operated and maintained. Indeed, the failure to repair the tunnel is the precise reason why water reached plaintiffs' property.[24] And the manner in which

[24] Great Lakes itself has framed this case to focus on land-based activities. Its admiralty petition alleges that the City is solely responsible for the flood and all of the damage that resulted. See J.A. 34, 38-39. Great Lakes' account of this case—that all plaintiffs were injured solely by the City's failure to maintain and repair the tunnel—is thus at odds with the Seventh Circuit's decision to identify Great Lakes' pile driving as the only relevant conduct.

the City monitored, evaluated, and maintained the tunnel has no substantial nexus to traditional maritime concerns.[25]

As with the first nexus prong, reference to *Sisson* makes the court of appeals' error readily apparent. Under the Seventh Circuit's narrow vision, the activity giving rise to the incident in *Sisson*—the fire—would have been the first negligent act that ultimately resulted in the tortious incident—the installation of a defective washer/dryer unit on a pleasure boat. But in holding that the relevant activity was the storage and maintenance of the vessel at the marina, this Court specifically rejected an approach so divorced from the threat to maritime commerce. The defect in the washer/dryer mattered little until the boat was docked at the marina and the defect caused a fire. Again, under the Seventh Circuit's test, *Sisson* would have come out differently. The installation of a washer/dryer in a pleasure boat does not bear a substantial relationship to traditional maritime activity. But the Court did not focus on that. It focussed instead on the precise activity that gave rise to tortious property damage—the storage and maintenance of the boat while docked in a marina—and concluded that that activity had a substantial relationship to traditional maritime concerns.

As to both the "incident" involved and the "activity giving rise to the incident," the court below asked different questions than *Sisson* allows. In a proper application of *Sisson*, it is easily seen that the incident—flooding of building basements—had no significant potential to disrupt commercial maritime activity, and that the activity giving rise to the incident—the operation of an underground tunnel connected to Loop buildings—bore no substantial

[25] We have confined our analysis to the claims brought against Great Lakes and Great Lakes' asserted rights of contribution and indemnity on those claims against the City. There has never been any contention that plaintiffs' claims against the City fall within admiralty jurisdiction.

relationship to traditional maritime activity. What damaged these plaintiffs was water coming into their basements from an underground tunnel, an event that does not pose any inherent threat to maritime commerce and hence does not implicate the traditional concerns of maritime law. Indeed, in this respect, this case is analogous to *Executive Jet* because any connection to navigable waters is fortuitous and incidental. See 409 U.S. at 273. Thus, there is no basis for the exercise of federal admiralty jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 22, 1994

QUESTIONS PRESENTED

1. Whether the court below correctly concluded that admiralty jurisdiction extended to respondent's complaint under the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 181 *et seq.*, brought to limit liability for alleged negligence in performing maritime repair activities on navigable water, when that alleged negligence resulted in closing the navigable waterway for more than a month.

2. Whether this Court should develop and apply a different test for admiralty jurisdiction over tort cases when those cases involve injury to "land-based" parties—a test requiring consideration of all the circumstances of the case, a balancing of federal and state interests, and an ad hoc policy assessment as to whether recognizing jurisdiction will advance the purposes of the jurisdictional grant—when the Admiralty Extension Act already expressly provides that admiralty jurisdiction shall extend to and include all cases of injury caused by a vessel on navigable water, "notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740.

PARTIES TO THE PROCEEDINGS

Petitioner in No. 93-762, Jerome B. Grubart, Inc., was a claimant in the limitation proceeding initiated in the United States District Court for the Northern District of Illinois by respondent Great Lakes Dredge & Dock Company, and an appellee before the Seventh Circuit. Petitioner in No. 93-1094, the City of Chicago, was a defendant in the limitation proceeding and an appellee before the Seventh Circuit.

Respondent's Rule 29.1 statement appears at Opp. Cert. ii.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-762

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

No. 93-1094

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT GREAT LAKES DREDGE & DOCK COMPANY

STATEMENT OF THE CASE

Factual Statement. The Chicago River ("the River") is an inland navigable waterway some 24 miles long, connecting Chicago Harbor on Lake Michigan with the Mississippi River, via the Illinois Waterway System. The River is traversed by numerous drawbridges as it flows through the City of Chicago ("the City"), including the Kinzie Street Bridge near the Merchandise Mart.

Adjacent to parts of the bridges in the River are timber pile clusters known in the maritime trade as "dolphins". The dolphins protect both the bridges and maritime traffic from the dangers of allisions. Pet. App. 10a-11a.[1] They also aid navigation by permitting tugboat pilots navigating the River to engage in "warping"—a maneuver in which the dolphins are used as a fulcrum to turn large-beam barges and barge flotillas in tight quarters such as the navigable channel near Kinzie Street—and by serving as points of reference similar to buoys to assist pilots in charting a course in the channel. J.A. 53, 57, 59. In contrast to many pilings on land, pilings on navigable waterways—like the pilings at issue here—are generally made of timber rather than steel. Although the timber naturally rots in water over time and needs to be replaced, timber dolphins minimize the damage to vessels from allisions. Steel dolphins would protect the bridge structure, and would last longer in water, but would cause far greater damage to and could readily sink a vessel if accidentally struck. *Id.* at 45-46, 52-53, 60.

In December 1990 the City solicited bids from marine firms for replacement of the timber dolphins near five drawbridges on the River, including the Kinzie Street Bridge. Pet. App. 25a. The dolphins near those bridges had deteriorated and represented a threat to navigation. J.A. 54, 70; Ct. App. Appendix 101. The specifications noted that the branches of the River were navigable streams, and that contractors must comply with marine regulations "so that river traffic may be protected and any river obstruction avoided." J.A. 25. Contractors were expressly "advised that the passage of vessels has first priority." *Id.* at 27. The Contractor was to supply all the necessary equipment, which "shall include barges, cranes, [and] tugs." *Id.* at 26.

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[1] References to "Pet. App." are to the Appendix to the Petition for Certiorari in No. 93-1094. References to "J.A." are to the Joint Appendix filed with this Court. References to "Ct. App. Appendix" are to the Appendix to Brief of Appellant filed with the Seventh Circuit.

Respondent Great Lakes Dredge & Dock Company ("Great Lakes") was awarded the contract. As contemplated in the City's specifications, the work had to be performed from vessels in the navigable channel, because the dolphins could not be reached by land. Great Lakes used three certified seaworthy vessels to replace the dolphins near the five drawbridges: a tug, the M/V Peach State, and two barges, Barge No. G.L. 136 (J.A. 76) and Barge No. G.L. 150 (J.A. 77). Great Lakes' vessels towed the barges from their berths on the Calumet River to the Cermak Road Bridge, where work began. The flotilla moved north up the River as work was completed on each bridge, from Cermak Road to Washington Street, Madison Street, Chicago Avenue, and finally Kinzie Street. Upon completion of the project the barges were towed back to their Calumet River berths.

Barge No. 136 was equipped with a crane to pull out the old and drive in the new timber pilings. Barge No. 150 transported new pilings from Great Lakes' facilities on the Calumet River to the various work sites, stowed old pilings until work at each site was completed, and then shipped the old pilings back to the Calumet River site for disposal. The barges occasionally transported the crew from one work site to another. Barge No. 136 was "spudded" into the river bed for stability during pile driving operations, but both barges were moved by the tug from time to time during the project to clear the channel for navigation, as required by the contract with the City. Pet. App. 27a; J.A. 47-50, 56-57.

On April 13, 1992, water from the Chicago River entered a freight tunnel running under the River through a breach in the tunnel near the Kinzie Street Bridge, quickly flooding an elaborate tunnel system underlying Chicago's downtown area as well as a number of buildings connected to the tunnels. This event became known as the "Chicago Flood". The breach created an eddy on the River, maritime traffic in the vicinity of the tunnel rupture was disrupted, and the Captain of the Port of Chi-

cago closed all three branches of the River in the downtown Chicago area for more than a month. Pet. App. 2a & n.1.

In the (literal) wake of the Flood, thousands of businesses and individuals filed suit against Great Lakes, alleging that Great Lakes negligently installed the dolphins at the Kinzie Street Bridge site, causing the breach in the tunnel. *See* J.A. 33-34, 43-44. These plaintiffs also alleged that the City was negligent, both in failing to disclose the existence of the tunnel to Great Lakes and in failing to maintain or repair the tunnel.

The Proceedings Below. On October 6, 1992, Great Lakes filed an action in United States District Court for the Northern District of Illinois, under the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 181, *et seq.* J.A. 31-44.[2] The suit sought exoneration from or limitation of liability in connection with the Flood, as well as indemnity and contribution from the City. The City and petitioner Jerome B. Grubart, Inc. ("Grubart") —a Chicago business that had sued Great Lakes in state court and filed a claim in the limitation proceeding— moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

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[2] The Limitation Act provides, in part:

> The liability of the owner of any vessel * * * for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except [in certain cases involving loss of life or bodily injury] exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. [46 U.S.C. App. § 183(a).]

In proceedings under the Limitation Act, the vessel owner deposits the value of the vessel with the court, notice is issued to claimants, the claims are adjudicated, and—if liability is found—the fund is divided pro rata among successful claimants in proportion to the amounts of their respective claims. *Id.* §§ 184, 185; Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F.

The District Court granted the motions on both grounds. It held that it lacked admiralty jurisdiction under both 28 U.S.C. § 1333(1) and the Admiralty Extension Act, 46 U.S.C. App. § 740, because, looking at "the totality of circumstances," "the relevant facts alleged to be present * * * do not involve traditional maritime concerns." Pet. App. 32a, 37a. As the court explained its approach:

> Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules. * * * The totality of circumstances lead unyielding to that conclusion. [*Id.* at 37a.]

The Court of Appeals for the Seventh Circuit reversed. It recognized that this Court in *Sisson* v. *Ruby*, 497 U.S. 358 (1990), had articulated the applicable test for admiralty jurisdiction:

> After *Sisson*, in ascertaining the existence of admiralty jurisdiction we ask three questions about the incident giving rise to the alleged wrong: (1) did it occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity? If all three questions are answered in the affirmative, a claim arising out of the incident falls within the admiralty jurisdiction. [Pet. App. 6a.]

The Court of Appeals criticized the District Court for relying instead on the "totality of the circumstances" test announced by the Fifth Circuit seventeen years before *Sisson*. *See Kelly* v. *Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). The Seventh Circuit explained that courts "may not engage in the sort

of policy analysis that apparently informed the district court's decision," under which they find admiralty jurisdiction "only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness." Instead, "the jurisdictional inquiry must be much more rigidly structured," confined to the three questions posed by this Court in *Sisson*. Pet. App. 7a.

The Court of Appeals answered each of those questions in the affirmative. First, the court noted that there was no dispute that the Chicago River was a navigable waterway or that Great Lakes' vessels were in the waterway as they performed their work. Although petitioners argued that most of the damage occurred on land away from the River, the court concluded that the Admiralty Extension Act answered any such arguments, by providing that "admiralty jurisdiction 'shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.'" Pet. App. 8a (quoting 46 U.S.C. App. § 740).

Second, the Seventh Circuit concluded that the incident posed a potential hazard to maritime commerce. As the court explained, this question was easily answered in this case, because the incident actually resulted in the closing of the Chicago River to maritime commerce for more than a month. Pet. App. 9a-10a.

Finally, the court ruled that the activity in which Great Lakes was engaged was substantially related to traditional maritime activity. The court found the parties' dispute over whether the dolphins were intended to protect bridges or also to protect ships and serve as navigational aids to be largely beside the point. As the court explained, this Court in *Sisson* required consideration only of "the general character of the activity." 497 U.S. at 365.

> There is no dispute that dolphins are capable of, and *generally* do, serve all of the purposes mentioned, two of which, protecting ships from collisions with bridges and aiding navigation, are unquestionably related to maritime activity. It follows logically that the installation of dolphins relates to maritime activity. [Pet. App. 10a-11a (emphasis in original).]

The Seventh Circuit also reversed the District Court's decision to dismiss Great Lakes' complaint for failure to state a claim under the Limitation Act. The court concluded that the record was inadequate to determine whether Great Lakes' negligence, if any, was the result of unreasonable activity by a managerial employee or the result of misconduct by one of its laborers at the job site. "Because Great Lakes' ability to invoke the Limitation Act rests upon these precise determinations, the district court erred in dismissing the complaint." Pet. App. 13a.

Grubart filed a petition for rehearing and suggestion for rehearing en banc, which was denied without recorded dissent. *Id.* at 19a. The City and Grubart then filed petitions for certiorari, each limited to the jurisdictional issue. This Court granted the petitions and consolidated the cases.

SUMMARY OF ARGUMENT

This Court's recent opinion in *Sisson* v. *Ruby*, 497 U.S. 358 (1990), set forth the test for admiralty jurisdiction in tort cases. Under that test, admiralty jurisdiction extends to cases in which the incident giving rise to the alleged wrong occurred on navigable water, posed a potential hazard to maritime commerce, and arose from an activity that is substantially related to traditional maritime activity. In this case, petitioners claim that Great Lakes caused the flood damage by negligently replacing dolphins in the Chicago River. The incident giving rise to that alleged wrong—Great Lakes' pile driving operations—took place on the navigable waters of the Chicago River. The incident plainly posed a threat to maritime

commerce; indeed, the threat was realized with the closing of the River for more than a month. Finally, the general activity that gave rise to the incident—maritime repair work—is closely related to traditional maritime activity. Maritime repair work on a navigable waterway to facilitate safe navigation is at least as closely related to traditional maritime activity as the docking activity found to satisfy this jurisdictional requirement in *Sisson*.

Petitioners' efforts to defeat admiralty jurisdiction under *Sisson* are unavailing. Although not disputing that Great Lakes' work replacing the dolphins took place on navigable water, petitioners emphasize that the injury—the flooding of basements—occurred on land. The plain language of the Admiralty Extension Act, however, makes that fact irrelevant to the jurisdictional analysis. Congress provided that admiralty jurisdiction "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land*." 46 U.S.C. App. § 740 (emphasis added). This is a case in which damage or injury is alleged to have been caused by vessels on navigable water. The Extension Act therefore applies, and brings this case within the admiralty jurisdiction. Petitioners' efforts to read additional, vague tests into the Act—requiring that the injury be "reasonably contemporaneous" with the wrong and within the "reach" of the vessel—cannot be squared with the unambiguous statutory language, and find no support in the legislative history.

The Extension Act defeats petitioners' other arguments under *Sisson* as well. Petitioners assert that flooded basements pose no threat to maritime commerce, but the focus under *Sisson* is on the alleged wrong—in this case, negligent pile driving—rather than the injury. A focus on where the injury occurred is flatly inconsistent with the Extension Act. By the same token, the City cannot escape the conclusion that the pertinent activity in this

case is maritime repair work, which is substantially related to traditional maritime activity.

Perhaps in light of the foregoing, petitioners devote most of their efforts to arguing that this Court should abandon the four-year-old *Sisson* test and adopt a new one for tort cases in which the interests of so-called "land-based parties" are at stake. Again the Admiralty Extension Act defeats petitioners' argument. The interests of land-based parties are at stake here for one reason and one reason only: because the injury occurred on land. The Extension Act plainly states that such a fortuity will not defeat admiralty jurisdiction. Creating and applying different tests for admiralty jurisdiction depending upon whether the injury occurred on water or on land would be contrary to the plain language of the Extension Act.

The exact content of the various new tests proposed by petitioners and their amici is unclear, but their approach departs from *Sisson* in requiring consideration of the "totality of the circumstances" and an ad hoc policy judgment, balancing federal and state interests, to determine whether those circumstances support the exercise of admiralty jurisdiction. Jurisdictional tests should be clear, simple, easily applied, and lead to predictable results. Petitioners' ad hoc balancing test based on policy judgments and consideration of all the circumstances is indeterminate and manipulable, and will lead to chaotic results. This Court should decline the invitation to embrace such an approach, and should instead reaffirm the more circumscribed and focused test articulated in *Sisson*.

ARGUMENT

I. THERE IS ADMIRALTY JURISDICTION OVER THIS CASE UNDER 28 U.S.C. § 1333(1) AND THE ADMIRALTY EXTENSION ACT

In *Sisson* v. *Ruby*, 497 U.S. 358 (1990), this Court unanimously upheld the exercise of admiralty jurisdiction over a yacht owner's effort to limit his liability arising from a fire on the yacht while it was docked at a marina. The Court explained that the test for admiralty jurisdiction over tort cases had both a situs and a nexus component. In addition to occurring on navigable water, the incident giving rise to the alleged wrong must also have the potential to disrupt maritime commerce, and arise from an activity substantially related to traditional maritime activity. *Id.* at 362-367. The Court of Appeals correctly applied this test in upholding admiralty jurisdiction in this case.

A. The Incident Giving Rise To The Alleged Wrong Occurred On Navigable Water

There is no dispute that the Chicago River is navigable water of the United States. *See Escanaba Co.* v. *Chicago*, 107 U.S. 678, 683 (1883) ("Chicago River and its branches must, therefore, be deemed navigable waters of the United States"); *The John B. Lyon*, 33 F. 184 (N.D. Ill. 1887) (admiralty jurisdiction extends to a barge on the North Branch of the Chicago River). The contract itself provided that "[t]he Contractor's attention is directed to the fact that the Branches of the Chicago River involved are navigable streams." J.A. 25. Great Lakes' vessels engaged in replacing the dolphins were actually in the navigable channel, Pet. App. 7a, and frequently had to be moved throughout the course of the job not only as work progressed but also to allow maritime traffic to proceed through the channel. *Id.* at 27a; J.A. 47-50, 56-57. The work took place in navigable water, as the

old pilings were removed from the River and new pilings driven into the riverbed.[3]

B. The Admiralty Extension Act Precludes Petitioners' Efforts To Have Jurisdiction Turn On Where The Damage Was Done

Petitioners do not dispute that Great Lakes conducted its maritime repair work on navigable waters of the United States, and they seek to hold Great Lakes liable for the manner in which it conducted that work. The central burden of their various arguments, however, is that the damage to them occurred on land. This is not only the basis on which they seek to minimize the significance of the fact that the repair work took place on a vessel on navigable water, but also the basis on which they argue that there was no potential hazard to maritime commerce (*see infra* at [illegible]), the basis on which they contend that there was no substantial relation to maritime activity (*see infra* at 29-30), and the basis on which they urge the Court to adopt a new test for admiralty jurisdiction. *See infra* at 30-32.

At every turn, however, petitioners are met by the Admiralty Extension Act, 46 U.S.C. App. § 740. That statute provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include *all* cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land.* [Emphases added.]

The Act goes on to provide that "[i]n any such case suit may be brought * * * according to the principles of law

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[3] The dolphins were of course located just outside the channel itself, *see* J.A. 30, but that in no way alters the conclusion that they were in navigable water. As the Seventh Circuit noted, this Court has held that the navigable waterway extends from shore to shore. *See* Pet. App. 8a (citing *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251, 263 (1915)).

and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water." *Id.*

In considering each of petitioners' contentions, the Court should ask what the determinative factor is under petitioners' analysis. In each case that factor is that the damages were sustained on land. The Court should then consider whether that factor can be determinative of jurisdiction in light of the Admiralty Extension Act, which specifies that jurisdiction exists "notwithstanding that [the] damage or injury be done or consummated on land." 46 U.S.C. App. § 740. The answer is plainly no. In short, petitioners' entire case depends upon ignoring the plain language of the Admiralty Extension Act.[4] For that reason, we devote considerable attention to the Act at the outset.

This Court has frequently reiterated that "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). *See Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993); *Good Samaritan Hosp.*

[4] Petitioner Grubart candidly recognizes as much, stating that "[p]erhaps the Seventh Circuit's statement that Grubart's argument would 'render the Admiralty Extension Act meaningless' deserves more scrutiny. It is not implausible that modern judicial developments in this area have overtaken the statutory enactment." Grubart Pet. at 15 n.5. Needless to say, we do not think this Court should embrace an analysis that would render an Act of Congress meaningless, *see, e.g., Astoria Federal Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991) ("we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof"); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970) ("courts should construe all legislative enactments to give them some meaning"), nor do we think such an approach could be justified on the ground that the Act—a jurisdictional statute—had somehow been "overtaken" by judicial developments.

v. *Shalala*, 113 S. Ct. 2151, 2157 (1993). This is particularly true in interpreting jurisdictional statutes, where clarity and certainty are critical. *See Palmore* v. *United States*, 411 U.S. 389, 396 (1973) ("Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes' ") (quoting *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968)). The Extension Act, by its plain terms, is clearly applicable to this case.

1. *Great Lakes' craft were "vessel[s] on navigable water."* There is no dispute that Great Lakes' vessels performed their work under the contract on navigable water. Nor can there be any serious dispute that Great Lakes' crafts qualified as "vessels".[5] The Admiralty Extension Act itself does not define the word "vessel," but the applicable definition of the term is found in Title 1 of the United States Code, which provides that "[t]he word 'vessel' includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. The record here plainly demonstrates that each of the three craft used in performing the dolphin replacement contract satisfies this definition. Both barges were "load line certified" by the American Bureau of Shipping. J.A. 71.[6] The tug M/V Peach State was itself a seaworthy vehicle. All three of

[5] Petitioners disputed that proposition below, but both the District Court and the Court of Appeals rejected their arguments. The District Court, "[m]indful of the transportation functions performed by each," found "that the two barges and the launch utilized by Great Lakes to perform the pile removal and driving activity required under the contract were vessels for admiralty purposes." Pet. App. 36a. The Court of Appeals likewise found that Great Lakes' barges were vessels because "[t]here is no doubt" that they "are capable of, and have performed, * * * transportation functions." *Id.* at 8a. Neither Grubart nor the City resurrects the twice-defeated argument that Great Lakes' craft are not vessels for purposes of the Admiralty Extension Act.

[6] To qualify as "load line certified," a barge must be surveyed and meet seaworthiness criteria set out at 46 C.F.R. Part 42.

these craft were capable of being used "as a means of transportation on water," and were in fact used in that manner before, during, and after the work on the Chicago River. *See* J.A. 71-74.[7]

Grubart, but not the City, suggests that the Admiralty Extension Act does not apply because there is no allegation that one of the vessels itself caused the breach of the tunnel. But this Court has long recognized that "caused by a * * * vessel" is "customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship." *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 224 (1945). The Court applied this rule to the Admiralty Extension Act in *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 210 (1963) ("There is no distinction in admiralty between torts committed by the ship itself and by the ship's personnel while operating it").

Nor is it relevant, as Grubart suggests, that "it was an arguable appurtenance to that barge, either the crane or the pile driver, that is implicated in the breach." Grubart Br. at 35. This Court has squarely held that the Admiralty Extension Act applies where the damage is allegedly caused by an appurtenance to a vessel. As the Court explained in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), its earlier decision in *Gutierrez* turned "not on the 'function' the stevedore [in *Gutierrez*] was performing at the time of his injury, but, rather, upon the fact that his injury was *caused by an appurtenance of a ship * * * which the Court held to be 'an injury,*

[7] The Limitation of Vessel Owner's Liability Act applies, except as otherwise noted, to "all seagoing vessels," a term defined at 46 U.S.C. App. § 183(f), "and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, *barges*, and lighters." 46 U.S.C. App. § 188 (emphasis added). Although not directly applicable under the Admiralty Extension Act, this definition indicates that the craft at issue here were vessels within commonly-accepted definitions.

*to person * * * caused by a vessel on navigable water'* which was consummated ashore" under the Admiralty Extension Act. 404 U.S. at 210-211 (emphasis added).[8]

This understanding of the term "vessel" is not limited, as Grubart would like, to include only the barge and any *defective* appurtenances. *See* Grubart Br. at 34-35. In support of this argument, Grubart seizes upon language in *Margin* v. *Sea-Land Services, Inc.*, 812 F.2d 973 (5th Cir. 1987), in which the court refers to such "defective appurtenances." But the question, as explained in *Victory Carriers*, is whether an appurtenance of the vessel is alleged to have caused the injury. The appurtenance may —as in *Margin*—be alleged to have caused the injury because it was defective. It is equally true, however, that —as here—it may be alleged to have caused the injury due to some negligence in its use. In either case, the Admiralty Extension Act applies.

2. *Petitioners seek relief and Great Lakes seeks limitation of liability for injury allegedly "caused by a vessel on navigable water."* This case also satisfies the "causation" requirement of the Extension Act. The fact that Great Lakes denies liability altogether is no impediment to application of the Act. In its complaint, Great Lakes sought alternatively exoneration from liability and limitation of liability. J.A. 34-35. The pertinent admiralty rules specify that a complaint under the Limitation of Vessel Own-

[8] *See also Pryor* v. *American President Lines*, 520 F.2d 974, 978 n.3 (4th Cir. 1975) ("The Supreme Court has interpreted the [Extension] Act as extending the ship's liability for its crew and its 'appurtenances' "), *cert. denied*, 423 U.S. 1055 (1976); *Shea* v. *Rev-Lyn Contracting Co.*, 868 F.2d 515, 518 (1st Cir. 1989) (maritime crane "was truly an appurtenance of the barge"); *In re Exxon Valdez*, 767 F. Supp. 1509, 1512 (D. Alaska 1991) ("A ship *or its appurtenances* must proximately cause an injury on shore to invoke the Admiralty Extension Act and the application of maritime law") (emphasis added); *Maryland Port Administration* v. *S.S. American Legend*, 453 F. Supp. 584, 587 (D. Md. 1978) ("The language 'caused by a vessel on navigable water' has been construed to encompass not only accidents caused by a ship itself but also accidents caused by an appurtenance of the ship").

er's Liability Act "may demand exoneration from as well as limitation of liability," Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F(2), and no court has accepted the City's sophistic suggestion that because Great Lakes denies that its vessels caused any injury at all, the Extension Act does not apply. *See* City Br. at 39-40.

Instead, the appropriate inquiry is whether the claims prompting the vessel owner to seek limitation of liability allege that his vessel caused damage or injury. *See* 46 U.S.C. App. § 185. Great Lakes specifically noted in its complaint the pending allegations that it caused the injury or damage. J.A. 33-34, 43-44.[9] Both Grubart (Br. at 4) and the City (Pet. at 18 n.5) continue to allege before this Court that Great Lakes caused the Flood. Those allegations bring this proceeding within the Admiralty Extension Act.

Contrary to petitioners' contentions, reading the Extension Act as written does not result in an unconscionable extension of admiralty jurisdiction. The plain language of the statute contains meaningful limitations. First, the Act applies only to situations involving vessels on navigable waters. Second, it applies only to claims that such a vessel caused the damage or injury.

The City rejects the view that the Act extends jurisdiction to injuries alleged to have been caused by the vessel in navigable water, arguing that this would cause practical problems. City Br. at 39. As the City sees it, under this approach a court cannot decide whether it has

[9] As the District Court noted:

> According to the Class Complaint, Great Lakes, in pounding and driving the pilings into the riverbed, caused one or more of the following conditions: an actual hole or breach of the tunnel wall; a weakening of the tunnel wall creating cracks or weakness in the structural integrity of the tunnel; a compacting of the earth around the tunnel walls creating excessive pressure on the tunnel; and such other events which proximately caused the tunnel wall to partially collapse or break. [Pet. App. 23a.]

jurisdiction until it decides causation, and so cannot decide jurisdiction until after trial. And if the trier of fact finds no causation, then the basis for the exercise of jurisdiction disappears. *Id.*

Far from being a novel conundrum, this is an issue this Court has addressed before in other contexts. For example, there is federal jurisdiction under 28 U.S.C. § 1346(b) over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *." Jurisdiction under that provision does not hinge on whether the employee actually caused the injury, but rather on the allegations in the complaint. The United States is free to deny liability—to claim that its employee did not cause the injury —without at the same time defeating federal court jurisdiction. So too here Great Lakes is free to deny petitioners' claims that it caused the flood damage without defeating admiralty jurisdiction over those claims.

The City itself candidly acknowledges that this is the general rule for deciding whether jurisdiction exists under the other bases of federal jurisdiction. *See* City Br. at 40 ("Thus the rule has emerged in federal question cases that as long as a complaint is not wholly frivolous on its face, it is sufficient to confer jurisdiction under 28 U.S.C. § 1331") (citing cases).[10] Rather than applying the rule that is applied to every other ground of federal jurisdiction, the City argues that "a special rule of proximate causation should be applied under the Extension Act to ensure that jurisdiction can be ascertained without fact-intensive inquiries." City Br. at 12. This "special rule" proposed by the City consists of a judicial amendment of the plain language of the Extension Act.

According to the City, the economical and direct phrase "injury * * * caused by a vessel on navigable water" in

[10] Not even petitioners' amici can endorse the City's proposal to abandon the established manner in which the Court deals with jurisdictional allegations. *See* Br. of the National Conference, *et al.*, at 18-19 & n.9.

the Extension Act should be read as if Congress had instead said "injury occurring 'reasonably contemporaneously with negligent conduct occurring on navigable waters' and not 'at a place farther from navigable waters than the reach of the vessel, its appurtenances, and cargo.'" *See* City Br. at 45. Such judicial amendment of the statutory language would allow the City to achieve its goal of being able to assert that Great Lakes caused the injury, *see* City Pet. at 18 n.5 ("Great Lakes' negligent pile driving was the proximate cause of the tunnel flood"), without thereby admitting that the Extension Act applied. In short, the City argues that "caused by" means one thing for purposes of liability, and something quite different for purposes of jurisdiction.

This approach does not avoid "fact-intensive inquiries" at all; it simply shifts the focus from notions of proximate cause with which courts are familiar to the new "special rule" advocated by the City. The "fact-intensive inquiries" are avoided not by devising "special rules" but by adhering to the approach this Court follows in every other area in which jurisdictional allegations are at issue. That approach tests jurisdiction not by trying the merits but instead by accepting the pertinent allegations unless they are insubstantial. *See, e.g., Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753, 768 (1993).

This Court explained the proper approach to jurisdictional allegations in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation*, 484 U.S. 49 (1987). There the Court rejected the argument that allegations sufficient to establish constitutional standing routinely must be proved as a matter of fact before a case could proceed to trial, an argument similar to petitioners' concern here that questions of causation must be finally resolved before jurisdiction under the Extension Act can be determined. *See* City Br. at 39-40. As this Court explained, the contention "fails to recognize that our standing cases uniformly recognize that allegations of injury are sufficient to invoke the jurisdiction of a court." 484 U.S. at 65. The allegations may be challenged at the jurisdictional stage, and if the

objecting party shows that the allegations are sham and raise no genuine issue of fact, the case should be dismissed for want of jurisdiction. Otherwise "the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail." *Id.* at 66. As the Court concluded, however, "the Constitution does not require that the plaintiff offer this proof as a threshold matter in order to invoke the District Court's jurisdiction." *Id.* So too here the issue of causation need not be resolved as a threshold matter to invoke jurisdiction under the Extension Act.[11]

3. *Neither this Court's cases nor the history of the Admiralty Extension Act justifies a departure from the plain meaning of the Act.* Petitioners rely on dicta from *Gutierrez* v. *Waterman Steamship Corp., supra,* as support for their "special rule". The case is an odd one to be featured so prominently in petitioners' briefs, *see* City Br. at 12, 42-43, 44; Grubart Br. at 21, 32, because the *holding* of the case rejected an argument—similar to that pressed by petitioners here—that admiralty jurisdiction should be defeated "because the impact of [the] alleged lack of care" was felt on land rather than on navigable waters. 373 U.S. at 209. As the Court held, "[w]hatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act * * * swept it away when it made vessels on navigable water liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land.'" *Id.* (quoting 46 U.S.C. App. § 740).

Gutierrez involved a longshoreman who suffered injury when he slipped on loose beans spilled on a dock from broken and defective bags unloaded from a ship. He filed a libel in admiralty against the ship, claiming that its owner caused his injuries. This Court upheld jurisdiction—even though the shipowner denied that it caused the injury—in reliance on the Extension Act. The Court noted that while the defendant raised "[v]arious far-

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[11] *Gwaltney* is also a complete answer to petitioners' reliance on *Crowell* v. *Benson*, 285 U.S. 22 (1932).

fetched hypotheticals" testing the reach of the Act, it was sufficient to hold that jurisdiction existed when, as in the case before the Court, "the impact * * * is felt ashore at a time and place not remote from the wrongful act." *Id.* at 210.

Petitioners contend that "a time and place not remote from the wrongful act" are judicially-implied limitations on the scope of the Extension Act, distinct from the limitations in the Act itself. They are not. The Act contains its own express limitations; additional ones need not and may not be judicially implied. *See Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) ("we are not at liberty to create an exception where Congress has declined to do so"); *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 617 (1980). The Court in *Gutierrez*, in disposing of the "[v]arious far-fetched hypotheticals," was simply referring to the Act's own express limitation that the vessel *cause* the injury. The Act authorizes jurisdiction over "*all* cases of damage or injury * * * caused by a vessel on navigable water" (emphasis added). The more "far-fetched" the hypothetical, the less possible it will be to allege that the vessel "caused" the injury.

Nor does this Court's decision in *Victory Carriers, Inc.* v. *Law*, *supra*, support the City's call for a "special rule" limiting the reach of the Extension Act to only *some* cases of injury caused by a vessel on navigable water. In *Victory Carriers*, the Court held that there was no admiralty jurisdiction over a claim by a longshoreman injured by an alleged defect in his stevedore employer's pier-based forklift, which the longshoreman was operating on a dock to transfer cargo to a point alongside a vessel. The Admiralty Extension Act had no application whatever to the case, because the injury was in no sense "caused by a vessel on navigable water." 46 U.S.C. App. § 740. This Court made that clear in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), noting that it has held that "there is no admiralty jurisdiction under the

Extension of Admiralty Jurisdiction Act over suits brought by longshoremen injured while working on a pier, when such injuries were caused, *not by ships*, but by pier-based equipment. *Victory Carriers, Inc.* v. *Law*." 409 U.S. at 260-261 n.8 (emphasis added). Indeed, this Court in *Victory Carriers* distinguished *Gutierrez* on that ground, noting that in *Gutierrez* "federal admiralty jurisdiction was clearly present since the Admiralty Extension Act on its face reached the injury there involved." 404 U.S. at 210. The Court in *Victory Carriers* did not rewrite the Extension Act by adopting any special remoteness rule; it simply ruled that the Act on its face did not apply.

Given the clarity of the language of the Extension Act, petitioners bear an "exceptionally heavy" burden of persuasion in arguing that Congress meant something other than what it said. *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2248 (1992); *Union Bank* v. *Wolas*, 112 S. Ct. 527, 530 (1991). Although there is no call for resort to legislative history in this case, *see City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994), nothing in that history remotely suggests that this is one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

As this Court has noted, the Extension Act was passed to overrule cases declining to uphold admiralty jurisdiction in situations in which a vessel on navigable water caused damage to a person or property not on navigable water. *See Victory Carriers, Inc.* v. *Law*, 404 U.S. at 208-209. The City contends that the legislative history shows that only a "modest expansion" of jurisdiction was intended, because the cases the Act was designed to repudiate involved damage to structures "on the shore." City Br. at 43. But the language Congress enacted into law provided jurisdiction notwithstanding that the damage

be done "on land," not "on shore." [12] And in any event, throughout the only pieces of legislative history available, Congress stated its intent to provide for admiralty jurisdiction when injury occurs "upon land"—not any more limited concept of "on shore." [13]

Finally, the City's tests focusing on whether an injury is "reasonably contemporaneous[]" and not "at a place

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[12] *See Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2038 n.2 (1992) ("legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning"); *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) ("it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute").

[13] *See* S. Rep. No. 1593, 80th Cong., 2d Sess. 1 (1948) (legislation addressed to problem that "[u]nder existing law, admiralty and maritime jurisdiction in respect of claims arising out of maritime torts is extended by the United States courts to only those cases where injury is done upon navigable waters, and not to those where injury is done to persons or property situated *upon land*, even though the injury is caused by a vessel situated on navigable waters") (emphasis added); H.R. Rep. No. 1523, 80th Cong., 2d Sess. 1 (1948) (same); S. Rep. No. 1593, *supra*, at 2 (problem is "the denial of admiralty jurisdiction in cases where injury is done *on land*") (emphasis added); H.R. Rep. No. 1523, *supra*, at 2 (same). Thus, while the City refers to "structures on the shore," City Br. at 43, the legislative history refers to "land structures." *See* S. Rep. No. 1593, *supra*, at 3 (letter from Acting Secretary of the Navy); H.R. Rep. No. 1523, *supra*, at 3 (same); S. Rep. No. 1593, *supra*, at 4 (letter from United States Maritime Commission); H.R. Rep. No. 1523, *supra*, at 5 (same).

The City stretches the concept of legislative history far beyond the snapping point in relying not on committee reports, legislative debate, or even committee hearings, but on the proceedings of private organizations 11 to 17 years prior to passage of the Act. *See* City Br. at 44 n.22. Even then the material is cited not for affirmative evidence supporting petitioners' view that "all cases" and "on land" in the statute actually mean "some cases" and "on shore within the reach of the vessel," but simply for lack of specific discussion of how far an Act that would not be passed for more than a decade should reach.

farther from navigable waters than the reach of the vessel, its appurtenances, and cargo" (City Br. at 45) are wholly unworkable and would lead to absurd results. If a vessel on navigable water were to strike a levee and cause flooding downstream, under the City's "special rule" admiralty jurisdiction would cover the claims of an owner whose building on shore was damaged, but not the claims of owners of buildings one block, two blocks, or three blocks inland—even though the flooding was allegedly caused by the same maritime activities on navigable water —because the latter owners are beyond "the reach of the vessel, its appurtenances, and cargo." If the fire at issue in *Sisson* had spread a block inland from the shore, the City would apparently contend that injuries at that point would be outside admiralty, even though other injuries from the same fire closer to shore would be in admiralty. Any attempt at such line-drawing re-introduces the very arbitrariness Congress thought it was eliminating when it passed the Extension Act, and provided that "all cases" of injury caused by a vessel on navigable water were within the admiralty jurisdiction, notwithstanding that the injury was consummated "on land". The Seventh Circuit below was correct in ruling that it would "not allow the fortuitous existence of an elaborate tunnel system, which simply transported the moving water away from the original breach and spread the damage, to defeat jurisdiction." Pet. App. 9a (footnote omitted).

C. Great Lakes' Allegedly Negligent Maritime Repair Work Posed A Threat To Maritime Commerce

Remarkably, the City contends that the requirement of a potential hazard to maritime commerce was not satisfied in this case. City Br. at 46. This in the face of the fact that the Chicago River was *closed* for more than a month because of the incident that gave rise to the alleged wrong and prompted the complaint for limitation of liability in admiralty. Pet. App. 2a & n.1. As the District Court recognized, "[r]iver traffic ceased, several commuter ferries were stranded, and many barges could not

enter the river system even south of Cermak Road because the river level was lowered to aid repair efforts." *Id.* at 22a. As the Court of Appeals noted, there was not only the potential for disruption of maritime commerce—the potential was realized. *Id.* at 10a.

The City seeks to avoid this conclusion by focusing on where the damage occurred, rather than on the incident giving rise to the alleged wrong. According to the City, the incident is water damage to basements, which poses no particular threat to maritime commerce. City Br. at 46. Once again the Admiralty Extension Act refutes the City's logic.

If the City were correct, admiralty jurisdiction would turn on whether the damage caused by a vessel on navigable water occurred on water or land. If as a result of negligent replacement of dolphins the pilings became loose, wedged in between the bridge supports, and blocked the navigable channel, the City would presumably acknowledge that the threat to commercial maritime activity requirement was satisfied.[14] But if as a result of the *same* negligence the pilings blocked the flow from a pipe emptying into the river and caused flooding in a building several blocks inland, the City would argue that the requirement was not met. Jurisdiction, under the City's view, would turn on whether the damage or injury was sustained on water or on land. But the Extension Act specifies that jurisdiction extends to "all cases of damage or injury * * * caused by a vessel on navigable water, *notwithstanding* that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740 (emphasis

[14] The City concedes as much. *See* City Br. at 21 ("if Great Lakes had negligently placed a piling in a navigable channel, where a vessel subsequently struck it and was damaged, the nexus to the federal interest in applying uniform rules that protect the free flow of maritime commerce would plainly be sufficient under *Sisson* to allow the exercise of federal jurisdiction"); *id.* at 47 ("the installation of pilings from barges has the potential to disrupt maritime commerce").

added). Applying the potential hazard to maritime commerce test as the City does is clearly inconsistent with the Extension Act.

It is also inconsistent with *Sisson*. This Court in *Sisson* explained that "a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." 497 U.S. at 363. The Court then described the "general features" of the incident before it as "a fire on a vessel docked at a marina on navigable waters." *Id.* There was no reference in characterizing the pertinent incident to what specific damage was caused, and certainly no reference to where any such damage happened to occur. Indeed, the Court in *Sisson* expressly rejected the argument that the threat to commerce was minimal because no commercial vessels were docked at the marina, because the pertinent inquiry is not concerned with what was damaged or where, but rather with whether the general features of the incident pose a threat to maritime commerce.

Under the City's view, if embers from the fire aboard the yacht in *Sisson* had been borne inland by the wind and ignited a house on land, the City would say the "incident" was the burning of a house on land, which poses no more threat to maritime commerce than a flood in a basement. But jurisdiction in *Sisson* depended on the fact that "a fire on a vessel docked at a marina on navigable waters * * * plainly satisf[ies] the requirement of potential disruption to commercial maritime activity." 497 U.S. at 363. Under the Admiralty Extension Act, it cannot matter where the injury from such an incident occurs.

The *Sisson* Court reiterated the point by recalling the analysis in *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982). The Court explained that "we supported our finding of potential disruption [in *Foremost*] with a description of the likely effects of a collision at the mouth of the St. Lawrence Seaway, an area heavily traveled by commercial vessels, even though the place

where the collision actually had occurred apparently was 'seldom, if ever, used for commercial traffic.' " 497 U.S. at 363 (quoting *Foremost*, 457 U.S. at 670 n.2). Where the injury actually occurred is not pertinent in assessing whether the incident that gave rise to the injury poses a threat to maritime commerce.

D. Great Lakes' Maritime Repair Work Was Substantially Related To Traditional Maritime Activity

The Court of Appeals correctly determined that the activity in which Great Lakes was engaged was substantially related to traditional maritime activity. Pet. App. 10a-11a. As the court explained, the dolphins being replaced by Great Lakes were intended to protect not only the bridges from passing ships, but also ships from the damage that might be caused were they to allide with the bridge. Although the City's contract specifications originally called for steel dolphins, that specification was changed to timber in part due to concerns raised by the United States Coast Guard. *See* J.A. 13; Ct. App. Appendix 83. As explained in an affidavit by the Coast Guard official who advised the City it would need to undergo additional permit application and review procedures to shift from timber to steel, timber dolphins afford greater protection to vessels than steel dolphins. J.A. 46; *see id.* at 52-53, 59-60.[15]

The dolphins also serve as aids to navigation. When towing large barges or flotillas of barges, or empty barges in high winds, tugboat pilots often lay up against timber dolphins to realign the barges, or use the dolphins as a fulcrum to help swing the barges around a turn, a maneuver known as "warping". *See* J.A. 46, 53, 57, 59. The

[15] Protection of the bridge itself is in any event related to protection of navigation. The Kinzie Street bridge is a "bascule" bridge, which opens to permit passage of masted traffic. If as a result of being struck the bridge were damaged and could not function, masted traffic would no longer be able to navigate under the bridge. *See* Ct. App. Appendix 18.

dolphins also aid navigation by serving as markers of the river channel, especially where the channel narrows and turns, as with the Chicago River at Kinzie Street. *See id.* at 53, 59. *See also CSX Transportation, Inc.* v. *M/V Hellesport Mariner*, 1991 WL 173045 (4th Cir. Sept. 10, 1991) (dolphins aid sighted navigation and are used as pivots for turning).

These various purposes are "unquestionably related to maritime activity." Pet. App. 11a. Put simply, if there were no navigation on the River, there would have been no need for the dolphins. Replacement of the dolphins was therefore clearly related to the traditional maritime activity of navigation. The Seventh Circuit's conclusion is in accord with at least a century of cases holding that installation and repair of pilings by vessels in navigable water, and maritime repair work generally, are within the admiralty jurisdiction.[16]

[16] *See, e.g., Shea* v. *Rev-Lyn Contracting Co.*, 868 F.2d at 518 (barge crew was engaged in traditional maritime activity when repairing bridge because crew maintained and loaded the vessel and "the types of repairs performed by [the defendant] must generally be accomplished through the use of boats, their crews, and other maritime instrumentalities"); *Nelson* v. *United States*, 639 F.2d 469, 472 (9th Cir. 1980) (construction of barrier to protect vessels from heavy waves is "an activity closely connected with traditional maritime activity"); *In re The V-14813*, 65 F.2d 789, 790 (5th Cir. 1933) ("[t]here are many cases holding that a dredge, or a barge with a pile driver, employed on navigable waters, is subject to maritime jurisdiction"); *In re New York Dock Co.*, 61 F.2d 777 (2d Cir. 1932) (admiralty case involving accident caused by barge driving piles for a Harlem River dock); *In re P. Sanford Ross, Inc.*, 196 F. 921 (E.D.N.Y. 1912) (accident caused by pile driving barge was within admiralty jurisdiction), *rev'd on other grounds*, 204 F. 248 (2d Cir. 1913); *Lawrence* v. *The Flatboat*, 84 F. 200 (S.D. Ala. 1897) (upholding admiralty jurisdiction over wage claim by crewman on pile driver used to construct navigation bulkhead because crewman's services were "maritime in their character"), *aff'd sub nom. Southern Log Cart & Supply Co.* v. *Lawrence*, 86 F. 907 (5th Cir. 1898).

Although some of these cases were decided before this Court formulated its "traditional maritime activity" test in *Executive*

Although the specific maritime repair work engaged in by Great Lakes in this case is itself a traditional maritime activity, it is important to recognize that this prong of the *Sisson* test is not so exacting. The Court asks only whether the "general character of the activity" giving rise to the incident bears a "substantial relationship" to traditional maritime activity. 497 U.S. at 364-365. The "general character of the activity" is maritime repair work, which—even if not considered "traditional maritime activity" itself—certainly bears a "substantial relationship" to traditional maritime activity. Indeed, this Court in *Sisson* identified the "fundamental interest giving rise to maritime jurisdiction" as " 'the protection of maritime commerce' " *id.* at 367 (quoting *Foremost*, 457 U.S. at 674), which is precisely what the dolphins replaced by Great Lakes *do*—protect vessels passing by the bridge from the dangers of allision and aid them in navigating under it.[17]

Jet, they demonstrate that claims arising from activities of the sort engaged in by Great Lakes' vessels have traditionally been cognizable in admiralty. This historical lineage demonstrates that the work undertaken by Great Lakes' vessels is "traditional maritime activity," unlike the aviation activities at issue in *Executive Jet*. *See Sisson*, 497 U.S. at 367 ("The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial").

[17] Petitioners' amici misperceive the pertinent inquiry in arguing that negligent pile driving is a "common construction tort" and not a " 'traditional maritime' one." Br. of National Conference, *et al.*, at 23. Use of a defective washer/dryer unit is not a traditional maritime tort either, yet there was jurisdiction in *Sisson*. The question is whether the general activity in which the vessel on navigable water was engaged is substantially related to traditional maritime activity, *see Sisson*, 497 U.S. at 364, not whether the particular tort is traditionally maritime. Here Great Lakes was engaged in maritime repair work on navigable water, at least in part in aid of navigation. That activity is unquestionably substantially related to the traditional maritime activity of navigation.

The conclusion that Great Lakes was engaged in an activity substantially related to traditional maritime activity follows *a fortiori* from *Sisson*. In *Sisson*, this Court found that docking and maintaining a vessel at a marina were substantially related to traditional maritime activity, noting that "[a]t such a marina, vessels are stored for an extended period, docked to obtain fuel or supplies, and moved into and out of navigation. Indeed, most maritime voyages begin and end with the docking of the craft at a marina." 497 U.S. at 367. The connection with actual navigation is far more direct in this case. Maritime repair work of the sort engaged in by Great Lakes permits navigation to occur. It is not simply supportive of navigation prior to and after the voyage, as was the case with the activity at issue in *Sisson*, but during the actual navigation.[18]

The City carries forward its mistaken analysis under the second prong of the *Sisson* test into the third. Viewing the "incident" as the flooding of basements, the City argues that the "activity" giving rise to that incident was its own management of the tunnel. City Br. at 48-49. The City is certainly correct to concede that its "failure to repair the tunnel is the precise reason why water reached plaintiffs' property." *Id.* at 48 (footnote omitted). As explained above, however, the City is quite wrong to regard the flooding of basements—the injury— as the pertinent incident in this case. The Admiralty Extension Act proves that. *See supra* at 24-25. Since the flooding is not the pertinent incident for purposes of the jurisdictional analysis, the City's failure to maintain and repair the

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[18] The City contends that "[n]one of the parties to this case was actually involved in navigation * * *." City Br. at 11. This is factually incorrect: Great Lakes, in performing its obligations under the contract, repeatedly moved its various vessels in the navigable waterway, not only as work progressed but also to clear the channel for other river traffic. *See* Pet. App. 27a. In any event, this Court in *Sisson* specifically rejected the argument that "maritime jurisdiction over torts is limited to torts in which the vessels are in 'navigation'." 497 U.S. at 367.

tunnel is not the pertinent activity. The incident is the alleged negligent replacement of the dolphins, and the activity that gave rise to that is Great Lakes' maritime repair work on navigable water. The general character of that activity is plainly substantially related to traditional maritime activity.

A hypothetical illustrates the significance of this aspect of the *Sisson* test, and demonstrates the error in the City's analysis. Suppose a plane flying over the Chicago River dropped its freight, and the impact of the freight on the riverbed led to the crack in the tunnel which eventually resulted in the flooding of the plaintiffs' basements. The "substantial relationship" element of the *Sisson* test would not be met, and there would be no admiralty jurisdiction, because the activity—carrying freight by air—is not substantially related to any traditional maritime activity.

By the same token, if a ship allided with the Kinzie Street Bridge and the allision caused the crack in the tunnel that eventually led to the flooding of the plaintiffs' basements, there would be admiralty jurisdiction, because the activity—navigation—is substantially related to traditional maritime activity. Yet the City's analysis would treat both cases the same, and find no admiralty jurisdiction in either case—even if in the latter case the plaintiffs were suing the vessel owner as well as the City, and even if the vessel owner invoked admiralty to limit liability—because of its view that the relevant activity in each instance is tunnel maintenance. Our approach—and that of this Court in *Sisson*—meaningfully distinguishes between the two cases, and results in a finding of admiralty jurisdiction here.

II. THIS COURT SHOULD NOT ABANDON THE *SISSON* TEST

In light of the foregoing, it is perhaps not surprising that the bulk of petitioners' briefs is not an argument that they satisfy the *Sisson* test, but instead an argument that

the Court should adopt a new test—one that they can satisfy. Thus, the City argues that a new test for admiralty jurisdiction should be developed "[i]n cases in which the interests of land-based parties are at stake," because "the *Sisson* test does not help sort out these cases." City Br. at 21.

Again the Admiralty Extension Act refutes the City's position. The "interests of land-based parties are at stake" here for one reason and one reason only: because the injury occurred on land. The Extension Act could not be plainer in establishing that such a fortuity does not defeat admiralty jurisdiction; jurisdiction exists under the Act "notwithstanding that [the] damage or injury be done or consummated on land." 46 U.S.C. App. § 740. Developing a different test for admiralty jurisdiction when the "interests of land-based parties are at stake"—*i.e.*, when the injury is consummated on land—would be nothing short of judicial circumvention of the unambiguous terms of the Extension Act.

Contrary to petitioners' contention, nothing in this Court's opinion in *Sisson* suggests that the Court left open the question whether the test in that case applied to a case involving land-based parties. What the Court noted in footnote in *Sisson* was that "all of the *instrumentalities involved in the incident* were engaged in a similar activity" and that "[d]ifferent issues may be raised by a case in which one of the *instrumentalities* is engaged in a traditional maritime activity, but the other is not." 497 U.S. at 365 n.3 (emphases added). The word "instrumentalities" is not synonymous with "parties," as the City would have it. *See* City Br. at 9, 16, 27. "[I]nstrumentalities involved in the incident" refers to those entities involved in bringing about (being instrumental in) the alleged wrong. That does not include victims with no connection to the activity or incident other than allegedly having been harmed by it.

Sisson was not anticipating and reserving the situation in which the injury was done to a land-based party; the

Admiralty Extension Act makes clear that such a happenstance does not defeat jurisdiction. As the Court of Appeals noted, adopting petitioners' view "would render the Admiralty Extension Act meaningless. That act seems explicitly to address situations, like this one, where the injury-causing activity occurs on a vessel on a navigable waterway but the injury itself is felt on land." Pet. App. 9a n.5. *See supra* at 12 n.4.

Nor is there any need to abandon the *Sisson* test and create a new one for situations in which "the interests of land-based parties are at stake." The City is unabashedly result-oriented in explaining why it believes the Court should devise a new test: the City believes it will lose its state-law immunity if admiralty jurisdiction is found to exist, and it does not want to lose that immunity. *See* City Br. at 21, 23, 30. In fact, the City goes so far as to propose a test for jurisdiction that focuses solely on the result on the merits it seeks to avoid—loss of its state-law immunity. Thus, the City contends that the test for *jurisdiction* should track this Court's established test for federal *pre-emption* of state law.

This approach conflates two very different analyses. Whether federal jurisdiction exists is an analytically separate question from what aspects of state law may or may not be pre-empted; looking at pre-emption prior to determining jurisdiction is putting the cart before the horse. This is of course true with respect to federal question jurisdiction generally. It is also true in the admiralty context, as this Court confirmed just months ago in *American Dredging Co.* v. *Miller*, 114 S. Ct. 981 (1994). There was no question that there was admiralty jurisdiction in that case,[19] but this Court concluded that state rather than federal *forum non conveniens* law applied. The Court noted the many situations in which admiralty

[19] The proceeding was actually in state court pursuant to the saving to suitors clause. *See* 28 U.S.C. § 1333(1).

jurisdiction and pre-emption of state law are not co-extensive:

> State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions * * * have been upheld when applied to maritime causes of action * * *. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. [114 S. Ct. at 987 (quoting *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373-374 (1959)).]

The City and its amici point to the numerous cases in which this Court has concluded that state law was not pre-empted by substantive maritime law. *See* City Br. at 29-30; Br. of the National Conference, *et al.*, at 9-12. We of course have no quarrel with those precedents; in fact, they make our point. As the amici acknowledge, "[t]he issue in these cases was what substantive law—state or federal maritime—to apply, and not what forum was proper to hear the dispute." *Id.* at 12. What the City fails to note is that many of the cases it relies upon were in admiralty themselves, and that in upholding the applicability of state law, the Court did not remotely suggest that there was anything improper with the exercise of admiralty jurisdiction.[20] No decision of this Court suggests that the test for jurisdiction should look ahead

[20] *See, e.g., Just* v. *Chambers*, 312 U.S. 383 (1941) (limitation of liability proceeding in admiralty; state wrongful death and survival of action law applied); *Vancouver Steamship Co.* v. *Rice*, 288 U.S. 445, 448 (1933) ("The admiralty court has jurisdiction," lien under state law enforced); *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 243-244 (1921) (libel in admiralty; "the District Court rightly assumed jurisdiction of the proceedings, but erred in holding the right of action was not barred under the state statute of limitation").

to the merits of the pre-emption issue and turn on a similar weighing of policies and interests. Jurisdiction and law to apply are fundamentally distinct questions; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), teaches that. And while there is no doubt that the grant of admiralty jurisdiction carries with it the power to apply federal rules of decision, whether that power may be exercised in any particular instance to displace state law is a separate question, the answer to which does not undermine the existence of jurisdiction in the first place.

Thus, the City is free to argue that the federal District Court sitting in admiralty should not deprive it of its immunity, because in its view there is no need for a uniform federal rule on that question. We certainly would oppose any such argument, and in doing so would rely heavily on this Court's decision in *Workman* v. *Mayor of New York*, 179 U.S. 552 (1900). The point is that any such arguments should be made on the merits of the pre-emption issue, not smuggled into the antecedent jurisdictional question—particularly because the broad sort of policy analysis often engaged in to determine pre-emption is so foreign to the nature of jurisdictional rules.

Justice Frankfurter made just that point in a related context in his opinion for the Court in *Romero* v. *International Terminal Operating Co., supra.* In that case the Court rejected an argument that jurisdiction over maritime claims was granted by 28 U.S.C. § 1331, the "arising under" provision. As the Court explained:

> If jurisdiction of maritime claims were allowed to be invoked under § 1331, it would become necessary for courts to decide whether the action "arises under federal law," and this jurisdictional decision would largely depend on whether the governing law is state or federal. Determinations of this nature are among the most difficult and subtle that federal courts are called upon to make. [358 U.S. at 375.]

The Court rejected the proposal to allow maritime claims to be invoked under Section 1331 in part because doing

so would make the jurisdictional test turn on the choice of law inquiry:

> Federal courts would be forced to determine the respective spheres of state and federal legislative competence, the source of the governing law, as a preliminary question of jurisdiction; for only if the applicable law is "federal" law would jurisdiction be proper under § 1331. The necessity for jurisdictional determinations couched in terms of "state" or "federal law" would destroy that salutary flexibility which enables the courts to deal with source-of-law problems in light of the necessities illuminated by the particular question to be answered. [358 U.S. at 376.]

Yet this is precisely the test petitioners propose for maritime jurisdiction generally: maritime jurisdiction, they argue, should turn on whether state or federal substantive law is to be applied. This Court was correct in 1959 to reject any such approach, and it should do so again today.

Nor are petitioners and their amici correct that a new jurisdictional test must be devised to safeguard interests of federalism. As noted, whether federal law pre-empts state law is a different question from whether there is federal admiralty jurisdiction. In addition, the test for admiralty jurisdiction articulated by this Court in *Sisson* already takes into account federalism concerns, by restricting jurisdiction to those situations in which the alleged wrong arises from an incident (1) on navigable water, (2) with the potential to disrupt maritime commerce, that (3) arises from an activity with a substantial relationship to traditional maritime activity. And to the extent the City argues that the test needs to be modified in the interests of federalism when the wrong injures land-based parties, Congress has already spoken to the issue in the Admiralty Extension Act, specifying that jurisdiction exists "notwithstanding that [the] damage or injury be done or consummated on land." 46 U.S.C. App. § 740.

Perhaps the strongest argument against adopting a new test is the nature of the various tests proposed by petitioners. In the first place, there is scant agreement as to what this new test should be.[21] Grubart apparently calls for the four-factor test articulated seventeen years *prior to* this Court's opinion in *Sisson* by the Fifth Circuit in *Kelly* v. *Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), as later "refined" by the Fifth Circuit—again prior to *Sisson*—by the addition of three more factors in *Molett* v. *Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987), *cert. denied*, 493 U.S. 1003 (1989).[22] *See* Grubart Br. at 17-18. Grubart notes that of the seven factors, it regards the "fourth factor in the *Kelly* test [as] the most important." Grubart Br. at 27. Grubart also adds a culinary component to its test, arguing that jurisdiction should not extend to situations that "lack the flavor of maritime law." *Id.* at 7.

Petitioners' amici propose that "a court should examine the complaint to identify 'the conduct alleged to have caused' the tort and ask whether there is a substantial federal maritime interest in providing a uniform rule of decision for the tortious conduct at issue." Br. of the National Conference, *et al.*, at 4.[23] Amici are therefore

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[21] The City acknowledged in its Motion for Divided Argument in this case that "[a]lthough both petitioners agree that the Seventh Circuit was wrong, we agree on very little else in the state or federal litigation." Motion for Divided Argument (May 9, 1994), at 3.

[22] The four *Kelly* factors are (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and the type of injury, and (4) traditional concepts of the role of admiralty law. *See* 485 F.2d at 525. The three *Molett* factors are (1) the impact of the event on maritime shipping and commerce, (2) the desirability of a uniform national rule to apply to such matters, and (3) the need for admiralty expertise in the trial and decision of the case. *See* 826 F.2d at 1426.

[23] Petitioners' amici get off on the wrong foot by rephrasing the "Question Presented" in a manner that bears no relation to the facts of this case. Contrary to amici's suggestion, this is hardly a

in direct conflict with the City, which, as noted, contends that courts should not rely on the causation allegations of the complaint. *See supra* at 16-18.

The City views its test as "substantially the same as that of the four dissenters in *Foremost* and as the *Kelly* test," although it claims to have "endeavored to formulate the test with somewhat more precision than *Kelly* did." City Br. at 32 n.17. The "more precise" test proposed by the City is as follows:

> [I]n cases involving land-based parties and injuries, a federal court should satisfy itself that the totality of circumstances reflects a federal interest in protecting maritime commerce sufficiently weighty to justify shifting what would otherwise be state-court litigation into federal court under the federal law of admiralty. [*Id.* at 32.]

The obvious first question is exactly when any of these new tests should apply and when the established *Sisson* test should be followed. *Sisson* itself involved damage to "water-based" parties (the other yachts) and a "land-based" party (the marina). *See* 497 U.S. at 360. The line between injuries to water-based and land-based parties is neither defined by petitioners nor obvious. A single incident involving a vessel on navigable water engaged in traditional maritime activity can often cause injury to both land-based and water-based parties. *Sisson* is one example; this case is another: the incident here led to the closing of the Chicago River, which the District Court found injured those presumably "water-based" entities engaged in commerce on the River. *See* Pet. App. 22a ("River traffic ceased, several commuter ferries were stranded, and many barges could not enter the river system"). Keeping in mind that proceedings under the Limitation Act are intended to bring into court *all* claim-

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situation in which Great Lakes' allegedly tortious conduct "cause[d] damage only to non-maritime parties." Br. of the National Conference, *et al.*, at i. *See supra* at 23-24.

ants against the vessel, how is jurisdiction to be treated under the City's proposal in a case involving injury to both water-based and land-based parties? The *Sisson* test has no difficulty with such a case, since it—consistent with the Admiralty Extension Act—focuses not on where the injury was consummated (land or water) but on the incident and activity giving rise to the wrong.

Petitioners' "totality of the circumstances" test—however well-suited it may be for pre-emption purposes—is peculiarly ill-suited to serve as a jurisdictional test. It is a basic axiom that jurisdictional rules should be clear, simple, easily applied, and lead to predictable results.[24] This Court has acknowledged the value of these features in each of its leading modern admiralty jurisdiction cases. *See Executive Jet*, 409 U.S. at 266 (rejecting application of locality test to aviation cases in part because "the locality test in such cases * * * is sometimes almost impossible to apply with any degree of certainty"); *Foremost*, 457 U.S. at 677 (rejecting commercial/non-commercial distinction because of "the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat"); *Sisson*, 497 U.S. at 364 n.2 ("all things being equal, simpler jurisdictional formulae are to be preferred"). *See also id.* at 375 (Scalia, J., concurring in the judgment).

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[24] *See, e.g.*, Charles A. Wright, *The Federal Courts After Appomattox*, 52 A.B.A.J. 742, 745 (1966) ("So long as we maintain separate systems of lower courts, it is essential that we draw truly the line that divides their jurisdiction. The line should be bright and clear, so that judicial time is not wasted on cases brought in the wrong court."); Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 W. & Mary L. Rev. 683, 685 (1981) ("One of the first things we teach entering law students is the importance of clarity in rules governing courts' jurisdiction. One reason for jurisdictional rules to be clear and simple is that litigating at length over the proper forum in which to litigate is a poor use of limited judicial resources").

Jurisdictional tests should be reasonably simple and precise, so that plaintiffs or petitioners can determine with some certainty where to file, preliminary skirmishes over the choice of forum can be minimized, and courts can dispose of jurisdictional challenges promptly and with a high degree of certainty of correctness. The need for clear rules leading to predictable results is heightened by the fact that objections to jurisdiction cannot be waived, and reviewing courts are obligated to raise jurisdictional issues *sua sponte*. A vague, manipulable, and imprecise jurisdictional test generates uncertainty over where to file and prompts forum-shopping, encourages defendants to raise jurisdictional challenges in a larger number of cases, and gives no confidence that district court decisions are correct and will not be overturned after wasteful litigation on the merits.

The imprecision of petitioners' "totality of the circumstances" test is compounded by the fact that the circumstances are to be assessed to determine whether the "policy" underlying admiralty jurisdiction is implicated in a particular case. Although such an approach may be familiar in conflict pre-emption cases, it is utterly foreign to jurisdictional inquiries. Courts do not ask on a case-by-case basis whether a state court will be hostile to an out-of-state defendant in considering whether to uphold diversity jurisdiction, or ask on a case-by-case basis whether state courts will not properly construe federal law in considering whether to uphold federal question jurisdiction. Rather, the court applies a more precise test that reflects the underlying policies, rather than looking to the policies in each case. Petitioners have cited no instance—and we are aware of none—in which jurisdiction hinges on such an ad hoc policy assessment.

Both the City's and Grubart's proposed tests expressly call for a "balancing of federal and state interests," directing courts to "assess the competing federal and state interests at stake." City Br. at 10, 31; *see* Grubart Br. at 28, 37. Whatever value such an approach may have in other

areas, an ad hoc, totality of the circumstances, policy-based balancing test is woefully unsuited to answering the threshold jurisdictional question of where a complaint should be filed. It is also inconsistent with *Sisson*, in which this Court expressly eschewed a "fact-specific jurisdictional inquiry," and emphasized that the pertinent "activity" for purposes of jurisdictional analysis is *not* defined "by the particular circumstances of the incident." 497 U.S. at 364.[25]

Consider what a party trying to determine whether or not its complaint should be filed in admiralty would need to consider under petitioners' theory of jurisdiction: First, it would need to decide whether the case would be subject to this Court's *Sisson* analysis, or instead analyzed under petitioners' alternative approach for cases in which interests of "land-based parties" are at stake (apparently to some greater extent than they were in *Sisson*). If the latter, the party would need to weigh at least seven factors, taken from the *Kelly* and *Molett* tests: the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, traditional concepts of the role of admiralty law, the impact of the event on maritime shipping and commerce, the desirability of a uniform national rule to apply to such matters, and the need for admiralty expertise in the trial and decision of the case. These seven factors are simply an illustrative starting list; the party would need to weigh the "totality of the circumstances" in assessing jurisdiction. It would further need to decide whether that "totality of the circumstances reflects a federal interest in protecting maritime commerce sufficiently weighty to justify shifting

[25] *See also Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (extraterritorial jurisdiction over securities law claims) ("it would also seem counterproductive to adopt a balancing test, or any test that makes jurisdiction turn on a welter of specific facts. * * * [S]uch tests are difficult to apply and are inherently unpredictable. * * * They thus present powerful incentives for increased litigation on the jurisdictional issue itself * * *.").

what would otherwise be state-court litigation into federal court." City Br. at 32. The party would need to "balance federal and state interests" in making that judgment, *id.* at 30, and somehow determine whether the situation has "the flavor of maritime law." Grubart Br. at 7. In applying the Admiralty Extension Act, it would need to weigh whether any injury done or consummated on land was done or consummated near enough to the water to be within "the reach of the vessel, its appurtenances, and cargo," and whether the injury occurred "reasonably contemporaneously" with the negligent conduct. City Br. at 45. All this to determine in which court to file.

This is not a jurisdictional test; it is an invitation to chaos. The Court should decline the invitation and reaffirm the applicability of the more focused analysis in *Sisson*.

III. THE ADMIRALTY EXTENSION ACT AND THE LIMITATION OF VESSEL OWNER'S LIABILITY ACT PROVIDE INDEPENDENT BASES FOR FEDERAL ADMIRALTY JURISDICTION

A. Quite apart from the foregoing, the Admiralty Extension Act, 46 U.S.C. App. § 740, provides an independent basis of federal jurisdiction over Great Lakes' complaint.[26] As noted, the language of the Extension Act is clear:

[26] Great Lakes cited the Extension Act as a basis of jurisdiction in its complaint, J.A. 31, and has preserved that argument at every stage of this litigation. *See* Pet. App. 31a-32a; Ct. App. Br. of Appellant at 1, 4, 38-41; Ct. App. Reply Br. of Appellant at 4-6, 16-17. In its two most recent admiralty jurisdiction cases, this Court has been careful to note the argument that the Extension Act provides an independent basis of jurisdiction, but has not found it necessary to decide the issue. *See Sisson*, 497 U.S. at 358-359 n.1; *Foremost*, 457 U.S. at 677 n.7. Here the Court need address the question only if it concludes, contrary to the foregoing submission, that 28 U.S.C. § 1333(1) and the Extension Act together fail to support jurisdiction in this case.

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. [46 U.S.C. App. § 740.]

As explained above, this is a case involving "damage or injury to * * * property," allegedly "caused by a vessel," *see supra* at 13-19, "on navigable water," *see supra* at 10-11. It is therefore "include[d]" within the "admiralty and maritime jurisdiction of the United States."

The City adopts a strained construction of the statute to avoid this natural reading. According to the City, "[t]he Admiralty Extension Act merely extends 'admiralty and maritime jurisdiction,' whatever that is, to certain land-based injuries." City Br. at 33 & n.18. But when we say "diversity jurisdiction extends to cases involving parties from different States," or "federal question jurisdiction extends to cases arising under a federal statute," the natural meaning conveyed is that "cases involving parties from different States" defines diversity jurisdiction, and "cases arising under a federal statute" defines federal question jurisdiction, not that "diversity jurisdiction" or "federal question jurisdiction" have some *a priori* meaning limiting the plain language of the defining clause.[27] Here 46 U.S.C. App. § 740 describes a category of cases to which the admiralty and maritime jurisdiction of the United States extends: those cases "of damage or injury, to person or property, caused by a vessel on navigable water," whether or not the damage or injury is consummated on land.

In addition, the City's argument ignores the fact that the statute by its terms does *not* "merely extend[] 'admiralty and maritime jurisdiction,' whatever that is, to certain land-based injuries." City Br. at 33 & n.18. The statute also specifies that admiralty jurisdiction shall "include" the described category of cases. So, to use the City's phraseology, whatever admiralty and maritime jurisdiction is, we know it "include[s] all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740.

The District Court below agreed with petitioners, concluding that jurisdiction under the Extension Act was limited by the same "maritime relationship" test applicable to jurisdiction under 28 U.S.C. § 1333(1), even though no such restriction is specified by the terms of the statute. According to the District Court, "[c]laims under the Admiralty Extension Act are to be subject to the 'maritime relationship' rule of *Executive Jet*."[28] That reasoning suffers from a glaring anachronism. Congress passed the Extension Act in 1948; *Executive Jet* was decided and introduced the 'maritime relationship' rule under 28 U.S.C. § 1333(1) in 1972. When the Extension Act was passed, jurisdiction under 28 U.S.C. § 1333(1) was determined by the strict situs test. Congress could hardly have implicitly limited the scope of the language of the Extension Act to conform to a limitation in Section 1333(1) that would not be announced for another 24 years.[29]

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[27] The use of the word "extend" to define the content of a jurisdictional grant is natural enough; that is, after all, the formulation used in Article III. *See* U.S. Const. Art. III, § 2 ("The judicial Power shall extend to * * *.").

[28] Pet. App. 32a (citing, *inter alia*, *Crotwell* v. *Hockman-Lewis, Ltd.*, 734 F.2d 767 (11th Cir. 1984); *Sohyde Drilling & Marine Co.* v. *Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir.), *cert. denied*, 454 U.S. 1081 (1981). The Court of Appeals found jurisdiction under 28 U.S.C. § 1333(1) and the Extension Act, and thus had no occasion to consider whether the Extension Act alone conferred jurisdiction.

[29] *See* 1 Steven F. Friedell, *Benedict on Admiralty* § 173, at 11-40 - 11-41 (7th ed. 1993) ("One could argue that Congress did not intend to impose a maritime nexus requirement in the [Extension] Act. At the time that the Act was passed, it was generally thought that no maritime nexus was required. And under the Commerce Clause,

B. The Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 181, *et seq.*, also provides an independent basis for federal court jurisdiction of Great Lakes' complaint under that Act.[30] As first enacted in 1851, the Limitation Act was understood to confer on the courts jurisdiction that was co-extensive with traditional maritime jurisdiction. *See, e.g., Ex Parte Phenix Ins. Co.*, 118 U.S. 610 (1886). In *Richardson* v. *Harmon*, 222 U.S. 96 (1911), however, this Court held that an 1884 amend-

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Congress could extend admiralty jurisdiction without requiring a maritime nexus.") The treatise ultimately rejects this argument, but for an entirely unpersuasive reason. According to the treatise, this construction should be rejected because while the Extension Act makes clear that torts consummated on land are not for that reason less entitled to be considered maritime than torts consummated at sea, there is no reason to think torts consummated on land are to be preferred. But nothing in the plain language reading of the Extension Act would prefer torts consummated on land; the Act extends jurisdiction equally to cases of injury caused by a vessel on navigable water, regardless of where the injury is consummated. The result of viewing the Extension Act as an independent basis of jurisdiction is thus similar to the test proposed in the opinion concurring in the judgment in *Sisson*. *See* 497 U.S. at 373 ("a tort occurring on a vessel conducting normal maritime activities in navigable waters—that is, as a practical matter, every tort occurring on a vessel in navigable waters—falls within the admiralty jurisdiction of the federal courts") (Scalia, J., concurring in the judgment).

[30] Great Lakes raised this argument before both the District Court and the Court of Appeals. *See* Ct. App. Br. of Appellant at 41 n.10; Great Lakes' Memorandum in Opposition to the Motions to Dismiss at 13 n.8. The District Court rejected Great Lakes' argument on the basis of the Seventh Circuit's earlier decision in *Complaint of Sisson*, 867 F.2d 341, 348-350 (7th Cir. 1989), *rev'd on other grounds*, *Sisson* v. *Ruby*, *supra*. *See* Pet. App. 41a-42a. In light of its holding on the question of admiralty jurisdiction, the Seventh Circuit below did not reach the question of whether the Limitation Act constituted an independent basis for jurisdiction. *See* Pet. App. 11a n.8. This Court in *Sisson* also found it unnecessary to reach the question, given its finding that jurisdiction existed under 28 U.S.C. § 1333(1). *See* 497 U.S. at 358-359 n.1.

ment to the Act—now codified at 46 U.S.C. App. § 189—changed that result.

Richardson involved an action under the Limitation Act resulting from the allision of a barge and a drawbridge. The district court had dismissed the action for want of jurisdiction, holding that the claim "was for a non-maritime tort, not cognizable in a court of admiralty, and that the limited liability act of Congress did not extend to any such right of action." 222 U.S. at 101. This Court reversed. The Court noted that the language of the amendment evinced an intent to expand the previous protection of the Limitation Act, consistent with the general purpose of Congress "to further encourage the ship-owning industry." *Id.* at 104. Accordingly, the Act applied to "all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime * * *." *Id.* at 106. The decision reversing the district court's finding of lack of jurisdiction established that the Limitation Act is as an independent source of federal court jurisdiction quite apart from traditional admiralty jurisdiction.

Richardson has long been understood in this way.[31] It has not been overruled, nor have the relevant portions of the Limitation Act been modified by Congress. Ac-

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[31] *See, e.g., Just* v. *Chambers*, 312 U.S. at 386 (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *United States* v. *Matson Nav. Co.*, 201 F.2d 610, 616 (9th Cir. 1953) ("The Supreme Court upheld the Act in *Richardson* * * * even though it considered the Act as an extension of admiralty jurisdiction to theretofore non-maritime torts"); *The Trim Too*, 39 Supp. 271, 273 (D. Mass. 1941) (Proceedings under Limitation Act "form an independent head of jurisdiction without regard to whether the claims limited against are such as might be sued upon in admiralty or not") (quoting the then-current edition of *Benedict on Admiralty*); 1 Friedell, *Benedict on Admiralty* § 225, at 11-46 ("Proceedings by vessel owners to limit their liability * * * are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty").

cordingly, under the established precedent of this Court, the Limitation Act provides an independent basis for jurisdiction over Great Lakes' complaint.

Several courts, however, have determined that they need not abide by this authority.[32] In *Complaint of Sisson*, for example, the Seventh Circuit held that adoption of the Admiralty Extension Act and developments in the law of admiralty jurisdiction generally permitted it to ignore this Court's holding in *Richardson*. Neither basis supports the conclusion. As to the former, it has been asserted that the Extension Act "eliminate[s] the need * * * for the rule established by [*Richardson*]." *Complaint of Sisson*, 867 F.2d at 349. The conclusion that *Richardson* is no longer good law because of the passage of the Admiralty Extension Act rests on the curious assertion that Congress adopted a statute to codify the rule of *Richardson* that somehow eliminates the holding of *Richardson*. That is plainly not the case. Nor does the development of the maritime nexus test obviate the rule of *Richardson*. A judicially-created requirement of a maritime nexus simply has no role to play in the context of a statute that has long been recognized to reach non-maritime torts.[33] The Limitation Act accordingly provides a jurisdictional basis for Great Lakes' complaint whether or not the Court finds the case to be within general admiralty jurisdiction.

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[32] *See Guillory* v. *Outboard Motor Corp.*, 956 F.2d 114, 115 (5th Cir. 1992); *David Wright Charter Serv.* v. *Wright*, 925 F.2d 783, 785 (4th Cir. 1991) (per curiam); *Three Buoys Houseboat Vacations U.S.A. Ltd.* v. *Morts*, 921 F.2d 775, 779-780 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 272 (1991); *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046, 1052-54 (11th Cir. 1989).

[33] The *Executive Jet* Court itself noted that the rule it adopted, which defeated admiralty jurisdiction in that case, applied "in the absence of legislation to the contrary." 409 U.S. at 274.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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Nos. 93-762 & 93-1094

IN THE

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JEROME B. GRUBART, INC.,
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v.
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Respondent.

CITY OF CHICAGO,
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v.
GREAT LAKES DREDGE & DOCK COMPANY and
JEROME B. GRUBART, INC.,
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On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER CITY OF CHICAGO

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25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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REPLY BRIEF FOR PETITIONER CITY OF CHICAGO

I. FEDERAL ADMIRALTY JURISDICTION SHOULD BE RECOGNIZED ONLY WHEN A FEDERAL INTEREST IN PROTECTING MARITIME COMMERCE IS PRESENT.

We explain in our opening brief that when a tort on a vessel causes land-based injury to a nonmaritime party, admiralty jurisdiction should not preempt the traditional state power to adjudicate such cases unless preserving state jurisdiction would interfere with the federal interest in protecting maritime commerce. See Chicago Br. 28-32. While Great Lakes does not dispute that the rights and liabilities of land-based parties not engaged in maritime activities are normally governed by state law, it maintains that "[t]he plain language of the Admiralty Extension Act . . . makes that fact irrelevant to juris-

dictional analysis" because the Extension Act provides for admiralty jurisdiction " 'notwithstanding that . . . damage or injury be done or consummated on land.' " G.L. Br. 8 (quoting 46 U.S.C. App. § 740). And, taking its reading of the Extension Act to its logical conclusion, Great Lakes ultimately contends that the Act extends federal jurisdiction to any "case involving 'damage or injury to . . . property,' allegedly 'caused by a vessel' " (G.L. Br. 42 (quoting Section 740)), and does not require satisfaction of any nexus test, not even the one found in *Sisson v. Ruby*, 497 U.S. 358 (1990).

Two flaws lie at the core of Great Lakes' submission. First, the "plain language" of the Extension Act could not eliminate the requirement of a nexus to the federal interest in protecting maritime commerce; the scope of the Act is dependent on 28 U.S.C. § 1333, which itself contains a nexus requirement. Second, if the nexus test is to be applied with integrity, it should not be "irrelevant" that a case involves injuries to nonmaritime parties; the test for federal jurisdiction should be mindful of the impact on such parties and the States of extending maritime jurisdiction to such cases.

A. The Admiralty Extension Act Does Not Obviate The Need To Establish A Nexus To The Federal Interest In Protecting Maritime Commerce In Order To Assert Admiralty Jurisdiction.

When a case involves wrongful conduct on a vessel causing injury on navigable waters, it is now settled that such a maritime situs alone is insufficient to make the case one of "admiralty and maritime jurisdiction" under Section 1333; this Court has repeatedly rejected such a rigid locality test. Instead, the case must involve a "maritime tort" (*Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972))—a tort with some relationship to the federal interest in protecting maritime commerce. See, *e.g.*, *Sisson*, 497 U.S. at 364 & n.2; *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 673-75 & nn.4-5 (1982). While the language of Section 1333 nowhere refers to a nexus test, the Court has found a nexus requirement to be inherent in the concept of "admiralty and maritime jurisdiction," as we explain in our opening brief. See Chicago Br. 14, 17-21. Great Lakes' argument that the Extension Act is not similarly limited would mean that admiralty jurisdiction would be more expansive for land-based than for water-based injuries—a result that would be odd, to say the least. This Court should decline Great Lakes' invitation to create this anomaly—the Act does not convert every case of injury on land allegedly caused by a vessel on navigable waters into an admiralty action without regard to whether the case has a sufficient nexus to the federal interest in protecting maritime commerce.

As we explain in our opening brief, the purpose of the Extension Act was to alter the requirement that this Court had discerned in Section 1333 of an injury occurring on the water, but not otherwise to alter admiralty jurisdiction. See Chicago Br. 16-17, 38. The Extension Act states that "suit may be brought . . . according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water" (46 U.S.C. App. § 740), making quite clear that cases under the Act are governed by the same rules as for Section 1333 cases. And this makes sense, since the plain language of the Extension Act nowhere confers jurisdiction on district courts—that is done solely by Section 1333. The legislative history confirms Congress's intention to reach only causes of action that would have been within Section 1333 but for a nonmaritime situs: "Adoption of the bill will not create new causes of action. It merely specifically directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by article III, section 2 of the Constitution and already authorized by the Judiciary acts." S. Rep. No. 1593, 80th Cong., 2d Sess. 2 (1948); accord H.R. Rep. No. 1523, 90th Cong., 2d Sess. 3 (1948).

Thus the Extension Act cannot be read in isolation; it must be read in conjunction with Section 1333. As we explain above, that provision requires a nexus to the federal interest in maritime commerce. The Extension Act therefore does not abolish the nexus requirement and does not turn what would otherwise be nonmaritime torts into admiralty cases. Indeed, this Court has construed the Act to reach only torts "caused by a vessel admittedly within admiralty jurisdiction." *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360 (1969). See also *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209-12 (1971). Thus, although the Act repudiates the prior situs test—bringing within admiralty jurisdiction maritime actions regardless where injury is felt (subject to the limitation on remote claims we discuss below)—it nowhere eliminates the additional requirement of a maritime cause of action. And the Court has made clear that to be a maritime action, a case must have a sufficient nexus to the federal interest in protecting maritime commerce.

Three times since the enactment of the Extension Act, this Court has rejected the claim that Great Lakes makes here—that the Act brings into admiralty all cases of injury on land alleged to have been caused by a vessel on navigable water. Instead, the Court has looked to the strength of the relevant federal and state interests. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court held that Florida was not prevented from prosecuting ship owners under a statute governing liability for oil spills that damage the coast, rejecting an argument that the Extension Act meant that such claims fell within admiralty jurisdiction. The Court held that the Extension Act did not vest "the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States" (*id.* at 341); and that the States' power to adjudicate the liability of vessels causing "sea-to-shore pollution . . . is not silently taken away from the States by the Admiralty Extension Act." *Id.* at 343. Weighing the pertinent state and federal interests the Court concluded

that there was no federal interest sufficient to deprive the States of their traditional power to protect their coasts. See *id.* at 342-44. Similarly, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that Detroit could prosecute ship owners under a local smoke abatement ordinance because Congress had expressed no federal interest in regulating this problem and the ordinance advanced a clear local interest. See *id.* at 444-48.

Great Lakes tries to dismiss these two cases as involving "what substantive law . . . to apply, and not what forum was proper" (G.L. Br. 33), but in both cases the Court held that claims arising from ship-to-shore injuries need not be brought in admiralty if they implicate insufficient federal interests, a conclusion directly at odds with Great Lakes' view of the Extension Act. These are not choice-of-law cases: such cases would hold that although the claim must be brought in admiralty, the admiralty court is free to apply state law. Instead, these are cases about what forum was proper; they held that such claims need not be brought in admiralty at all. In any event, the third case, *Victory Carriers*, cannot be distinguished that way; it was unquestionably an admiralty jurisdiction case. The Court held that Law's claim that he had been injured while working on a dock loading Victory Carriers' vessel was not within admiralty jurisdiction because of the traditional rule that "injuries on land are covered, for the most part, by state substantive law." 404 U.S. at 213. Because neither the vessel nor its appurtenances ever touched Law, the relationship between the injury and the vessel was too "attenuated" for the Extension Act to reach the case. *Ibid.*[1] These de-

[1] Great Lakes would distinguish *Victory Carriers* on the basis that that case was outside the scope of Extension Act jurisdiction because it involved an injury caused by pier-based equipment rather than an appurtenance of a vessel. See G.L. Br. 20-21. But the Court did not reject Law's claim because there was no causal relationship between his injury and the vessel—plainly there was one, since Law was injured when the vessel was being loaded and

cisions make clear that even in cases in which it is alleged that an injury on land was caused by a vessel on navigable water, there can be an insufficient nexus to federal interests to require the injured party to proceed in admiralty. And in none of these cases, of course, did the Court treat the fact of injury occurring on land as "irrelevant."

There is thus simply no basis for reading the Extension Act to confer federal jurisdiction over a nonmaritime tort, that is, a case arising from an injury inland that does not implicate the federal interest in protecting maritime commerce. The Act "extends" landward only the locality of admiralty jurisdiction. A case can satisfy the locality test if it falls within the terms of the Extension Act, but it still must satisfy the nexus test as well.[2] To hold that the Extension Act supplies admiralty jurisdiction even when a case bears no relationship to the federal interest in protecting maritime commerce would "divorce[] the jurisdictional inquiry from the purposes that support the exercise of jurisdiction" (*Sisson*, 497 U.S. at 364 n.2)—something this Court has refused to do even in cases construing Section 1333. Such an approach cannot possibly enjoy any more success under the Extension Act.[3]

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alleged that the "negligence of Victory caused his injuries." 404 U.S. at 203. The Court's opinion never questioned the causal relation between the vessel and Law's injuries; rather the Court held that there was no Extension Act jurisdiction when the relation between the vessel and the injury is "attenuated." *Id.* at 213.

[2] The lower courts have uniformly held that Extension Act claims require a sufficient maritime nexus. See, *e.g.*, *Crotwell v. Hockman-Lewis, Ltd.*, 734, F.2d 767, 768 (11th Cir. 1984); *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1135-36 (5th Cir.), cert. denied, 454 U.S. 1081 (1981).

[3] Perhaps recognizing that it would be untenable to use a nexus test under Section 1333 but not under the Extension Act, amicus Maritime Law Association of the United States urges the Court to repudiate the nexus test altogether and adopt a "modified situs test" under which admiralty jurisdiction would include "any wrong occurring on or caused by a vessel on navigable waters." M.L.A. Br. 9. This approach has been urged before but has never gained

B. The Determination Whether A Case Involving Nonmaritime Parties Satisfies The Nexus Requirement Should Be Guided By Preemption Jurisprudence.

Although the nexus requirement is common to Section 1333 and the Extension Act, we explain in our opening brief that the question what constitutes a sufficient nexus to the federal interest in protecting maritime commerce should be analyzed differently in cases involving land-based injuries to nonmaritime parties than in cases like *Sisson* involving only parties engaged in maritime activities. That is because cases involving injuries on navigable waters and parties engaged in maritime pursuits risk no federal preemption of traditional aspects of state tort law. But cases like this one—arising from injuries incurred inland and parties not engaged in maritime activities—

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the support of more than two Justices. See 497 U.S. at 373-74 (Scalia, J., joined by White, J., concurring in the judgment). The Court rejected such an approach in *Foremost*, see 457 U.S. at 673-74, and again even more forcefully in *Sisson*, where the Court squarely held that "the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and . . . a case must implicate that interest to give rise to such jurisdiction." *Id.* at 364 n.2.

This holding was plainly correct; a situs test would sweep within federal jurisdiction a variety of cases that implicate no maritime interest and that for that reason should not be in federal court. See, *e.g.*, *Penton v. Pompano Construction Co.*, 976 F.2d 636 (11th Cir. 1992) (construction worker seeks recovery for injury caused by negligent operation of crane aboard stationary construction barge); *Watson on Behalf of Watson v. Massman Construction Co.*, 850 F.2d 219 (5th Cir. 1988) (worker on stationary construction barge seeks recovery for injuries caused by defective construction equipment); *Eagle-Picher Industries, Inc. v. United States*, 846 F.2d 888, 895-97 (3d Cir.) (asbestosis recovery sought by workers exposed while repairing vessels on water), cert. denied, 488 U.S. 965 (1988); *LaMontagne v. Craig*, 817 F.2d 556 (9th Cir. 1987) (per curiam) (recovery sought for defamatory message composed on and sent from ship); *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir.) (recovery sought for damage to oil well caused by negligence of repair work undertaken from stationary barge), cert. denied, 454 U.S. 1081 (1981).

threaten to preempt state-law rights and defenses traditionally governed by state tort law. Thus, this case requires the same approach to determining whether a federal interest justifies displacing state law as in other types of preemption cases. See Chicago Br. 30-32.

Great Lakes complains that "[w]hether federal jurisdiction exists is an analytically separate question from what aspects of state law may or may not be pre-empted." G.L. Br. 32. But this is beside the point. However separate the questions, there is and should be a close relation between jurisdiction and preemption in admiralty law. That is because admiralty jurisdiction necessarily has preemptive consequences. While there is no preemption of aspects of state law not considered "characteristic features of the general maritime law" or necessary to "the proper harmony and uniformity of the law" (*American Dredging Co. v. Miller*, 113 S. Ct. 981, 985 (1994)), such as the doctrine of *forum non conveniens* considered in *American Dredging*, use of state law is forbidden when it "deprive[s] a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953). Thus, as we explain in our opening brief, a court sitting in admiralty must employ substantive maritime law. See Chicago Br. 14-15, 26. And since application of substantive federal maritime law follows the assertion of admiralty jurisdiction as night follows day, the Court properly uses preemption concerns to inform its jurisdictional inquiry.

In *Victory Carriers*, the Court did just that: it refused to construe the Extension Act broadly because such a construction "would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state . . . statutes." 404 U.S. at 212. Precisely because extending admiralty jurisdiction inland threatens to federalize actions traditionally governed by state law, the Court concluded in *Victory Carriers*, and again in *Askew*, that it should "proceed with caution" when the

Extension Act is urged as a basis to enlarge federal jurisdiction past docks and piers. See 411 U.S. at 341; 404 U.S. at 212. And as we point out above, in both *Askew* and *Huron Portland Cement* the Court relied on its reluctance to preempt state law without sufficient justification to conclude that some cases of ship-to-shore injury need not be brought in admiralty.

Indeed, we thought it settled that federal preemption of the state substantive law is of jurisdictional significance. The Court has routinely used preemption analysis to determine if a state court may adjudicate tort liability in the face of a claim that such an adjudication would undermine a federal interest or policy.[4] The Court made explicit the jurisdictional significance of preemption in *International Longshoremen's Association v. Davis*, 476 U.S. 380 (1986). There the Court held that the union's argument that Davis's state tort action was preempted went to the state court's subject-matter jurisdiction, and was not a substantive defense that could be waived if not timely asserted. See *id.* at 387-93. Similarly, in *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that the preemptive effect of federal Indian law precluded state courts from exercising jurisdiction over civil actions against Native Americans when the cause of action arises on a reservation. And in *Kalb v. Feuerstein*, 308 U.S. 433 (1940), the Court held that the preemptive effect of federal bankruptcy law deprived state courts of subject-matter jurisdiction to hear foreclosure actions concerning property subject to the bankruptcy action; preemption was not a mere substantive defense that could be waived. See *id.* at 438-40. If the determination whether a state court has jurisdiction to adjudicate liability under state law is controlled by preemption analysis, there is no reason why the determination whether a federal court has jurisdiction to displace state law by hearing an admiralty action should not be similarly governed.

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[4] See, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992); *Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133 (1990); *English v. General Electric Co.*, 496 U.S. 72 (1990); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Great Lakes also resists our preemption analysis by arguing that "the test for admiralty jurisdiction articulated by this Court in *Sisson* already takes into account federalism concerns." G.L. Br. 35. Great Lakes is not well situated to make this argument. Great Lakes believes that the fact of damage on land is "irrelevant" to the jurisdictional analysis (G.L. Br. 8)—a position that concededly gives no weight to the legitimate interests of land-based parties or the traditional State power to control the liability rules, including governmental tort immunities, for land-based parties not engaged in maritime activities. As we explain in our opening brief, Great Lakes' reliance on the Extension Act implicates these serious federalism concerns. See Chicago Br. 23-25.

More important, *Sisson* did not involve an effort to extend admiralty jurisdiction inland to reach parties and property not engaged in maritime activities; hence the Court did not craft its test with the problems of extending federal jurisdiction inland in mind. *Sisson* involved only boat and marina owners—parties engaged in maritime activities—and the Court limited its holding to "cases in which all of the relevant entities are engaged in similar types of activity." 497 U.S. at 366 n.4. This is not such a case; Grubart and the other state-court plaintiffs were engaged in no maritime activities, and while the City may engage in some activities that may be considered maritime (such as maintaining bridges, see M.L.A. Br. 19-20), here the City is sued for its management of an underground tunnel, hardly a maritime activity. In this case, federal law requires an approach more sensitive than *Sisson* to the legitimate state interests in adequately compensating—or immunizing when warranted—nonmaritime parties. Because "state law has traditionally governed" the right of land-based parties (*Victory Carriers*, 404 U.S. at 212), the Court should "proceed with caution" (*ibid.*) that is unnecessary in a case like *Sisson*.

Great Lakes criticizes the test that we have derived from the Court's preemption jurisprudence as "vague,

manipulable and imprecise." G.L. Br. 39. But this test has not proven so outside the admiralty context; in other cases in which a party seeks to use federal law to preempt state tort law the Court has asked whether preserving state tort law undermines federal interests. *E.g.*, *English v. General Electric Co.*, 496 U.S. 72 (1990). Nothing about this test makes it inappropriate for use at the jurisdictional stage; indeed, as we explain above, the Court has employed preemption analysis to determine jurisdiction in a variety of contexts. The three specific questions we suggest—whether there is evidence of a federal interest in supplying the rules of decision for this type of case; whether there is a risk of conflicting, uncertain, or nonuniform rules for those engaged in maritime commerce; and whether preserving state jurisdiction would otherwise burden maritime commerce (see Chicago Br. 33)—are standard preemption fare. The *Sisson* test itself is hardly more clear-cut: defining the "general features" of the "incident" and "activity giving rise to the incident" (497 U.S. at 363-64) often cannot be easily or precisely done. Indeed, even Great Lakes' amicus urges the Court to abandon the *Sisson* test because it is too often "misinterpreted, misapplied or ignored." M.L.A. Br. 12. In contrast, our test—because it is derived from preemption jurisprudence—will be familiar to this Court and the lower courts; it will, if anything, enhance clarity and predictability in this area of the law.

Our opening brief explained why, applying traditional preemption principles in the admiralty context, there is no sufficient federal interest in adjudicating a case like this, where a pile-driving contractor, working from a stationary platform, allegedly damaged an underground structure and flooded land-based businesses. The tortious conduct alleged is not subject to federal regulation; state-court adjudication would not subject Great Lakes to potentially conflicting, nonuniform, or uncertain obligations; and state litigation would not otherwise burden maritime commerce. See Chicago Br. 33-38. Great Lakes takes issue with none of this. It comes closest to

meeting our arguments by its claim that there is a federal interest in adjudicating this case because the flood resulted in the closure of the Chicago River. G.L. Br. 23-24. But this case presents no claim arising from that disruption of maritime commerce—Great Lakes' admiralty petition does not embrace any claim by an entity engaged in maritime pursuits that was injured when the River was closed. Thus there is no federal interest here premised on the need to maintain the uninterrupted use of a navigable river for those engaged in maritime activities.[5] Instead, this case requires a court to define the standards for safeguarding underground structures when driving piles through "[river]bed and subsoil . . . , and admiralty law [i]s obviously unsuited to that task." *Rodrigue*, 395 U.S. at 365 (footnote omitted). Certainly the federal interest in adjudicating Great Lakes' liability is no stronger than it was in cases involving oil spills, air pollution, and pier-based injuries to dockworkers—all of which have been considered and rejected as a basis for admiralty jurisdiction in *Askew*, *Huron Portland Cement*, and *Victory Carriers*.[6]

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[5] Even the hypothetical existence of claims arising from the closure of the River supplies no federal interest in protecting such claimants, or even in protecting Great Lakes from such claims, since those who suffered economic losses resulting from delays occasioned by the River's closure cannot recover either under admiralty law (see *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927)) or Illinois law (see *Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166 (7th Cir. 1983)).

[6] Great Lakes also claims that our test is difficult to apply when an incident gives rise to both water- and land-based injuries. See G.L. Br. 37-38. But preemption analysis will have little trouble with such cases—when, as here, they arise from activities on stationary work platforms, there will rarely be a federal interest present sufficient to warrant admiralty jurisdiction. See, *e.g.*, *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1015-19 (1st Cir. 1985) (asbestosis claims of workers exposed while repairing vessels both ashore and on water not within admiralty because they do not implicate federal interests), cert. denied, 476 U.S. 1126 (1986). When, however, claims implicate federal interests in protecting maritime commerce, preemption analysis will support federal jurisdiction. See, *e.g.*, *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1031-32 (5th Cir. 1985) (en banc) (collision between ships causing damage to both ships and to shoreside property within admiralty jurisdiction because of the federal interest in enforcing uniform rules for navigation), cert. denied, 477 U.S. 903 (1986).

In a final effort to avoid explaining why the flooding of downtown basements is a concern of admiralty, Great Lakes presents an alternate ground for affirming the judgment below that does not depend on the existence of admiralty jurisdiction. Relying on *Richardson v. Harmon*, 222 U.S. 96 (1911), Great Lakes argues that the Limitation of Vessel Owners' Liability Act is "an independent basis for federal court jurisdiction" over this action. G.L. Br. 44. The district court rejected this argument (Pet. App. 39a-40a), which Great Lakes had confined to a footnote. The court of appeals reversed on other grounds, thus finding it unnecessary to reach the issue (Pet. App. 11a n.8), which was again confined to a footnote.

Great Lakes' position is difficult to square with the Limitation Act itself, since a 1936 amendment to the Act provides that the owner of a vessel may seek limitation of liability in a "district court of the United States of competent jurisdiction." 46 U.S.C. App. § 185. This is at best a strange phrasing for a grant of jurisdiction; the plain language appears to require some jurisdictional grant external to the Limitation Act itself. Indeed every circuit to decide this question in recent years has held that the Limitation Act reaches only cases otherwise within admiralty jurisdiction.[7] But this Court should not decide this issue now. Not only did the court of appeals fail to reach it, but that court might well conclude that Great Lakes has waived it. See, *e.g.*, *Colburn v. Trustees*

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[7] See *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115 (5th Cir. 1992) (per curiam); *David Wright Charter Service v. Wright*, 925 F.2d 783, 785 (4th Cir. 1991) (per curiam); *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 921 F.2d 775, 779-80 (8th Cir. 1990), cert. denied, 112 S. Ct. 272 (1991); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1052-54 (11th Cir. 1989); *In re Complaint of Sisson*, 867 F.2d 341, 348-50 (7th Cir. 1989), rev'd on other grounds *sub nom. Sisson v. Ruby*, 497 U.S. 358 (1990). This was also the Solicitor General's conclusion in an amicus brief in *Sisson*. See U.S. Br. 10-28, *Sisson v. Ruby*.

of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992). If the Court reverses, it should follow its usual practice and remand the case for the court of appeals' consideration, in the first instance, of the Limitation Act issues and whether they have been preserved.[8]

II. THE ADMIRALTY EXTENSION ACT DOES NOT CONFER JURISDICTION OVER INJURIES REMOTE IN TIME AND PLACE FROM CONDUCT ON NAVIGABLE WATERS.

In our opening brief, we explained why the court of appeals' construction of the Admiralty Extension Act—as extending admiralty jurisdiction to any injury on land caused by wrongful conduct on a vessel in navigable water—is inconsistent with *Sisson*. There the Court wrote that courts should not have to "decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." 497 U.S. at 365. This case highlights the anomalous construction of the Act that Great Lakes urges. In Great Lakes' view the Act extends even to cases in which it is ultimately proven at trial that a vessel did not cause damage ashore—the very fact that, in Great Lakes' view, serves as the basis for Extension Act jurisdiction. Indeed, Great Lakes' construction allows a party seeking to invoke federal jurisdiction on the causation language of the Extension Act to destroy federal jurisdiction by disproving causation. To avoid these anomalies, we urge that the Act be construed so that courts need not address difficult questions of proximate causation in order to determine whether they have jurisdiction. When an injury ashore is remote in time and place from conduct occurring on navigable waters, the injury should not be deemed "caused by" conduct on the water within the meaning of the Act. See Chicago Br. 42-45.

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[8] See, *e.g.*, *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 864-65 (1987); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 181-82 (1976).

While Great Lakes claims to rely on the "clarity of the language of the Extension Act" (G.L. Br. 21), this Court has never read the Act as Great Lakes does. In *Victory Carriers*, for example, the Court recognized the need to limit claims of causation under the Act. The Court rejected Law's claim because "the typical elements of a maritime cause of action [we]re particularly attenuated" (404 U.S. at 213): "Law was not injured by equipment that was part of the ship's usual gear or that was stored on board . . . and the accident did not occur aboard ship or on the gangplank" (*id.* at 213-14). To permit this type of claim to go forward therefore "would raise a host of new problems as to the standards for and limitations on the applicability of maritime law to accidents on land." *Id.* at 214 (footnote omitted). The Court concluded that the Extension Act does not reach injuries to persons not on a vessel or its gangplank unless they are physically injured by the vessel or its appurtenances; more attenuated claims of causation will not do. See *id.* at 212-14 & n.14.

Victory Carriers describes one prong of the remoteness test we advocate here: to be within admiralty jurisdiction, the injury must not occur at a place farther from navigable waters than the reach of the vessel, its appurtenances, or cargo. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), supplies the other: land-based injury must occur at a time reasonably contemporaneous with negligent conduct on navigable waters. See *id.* at 210. Although the language regarding remoteness may have been unnecessary to the decision in *Victory Carriers*, and plainly was dicta in *Gutierrez*, both cases correctly anticipate the serious problems of federalism and practical administration that follow if federal courts entertain admiralty cases based on an attenuated relation between conduct on water and injury on land.[9] Thus, we urge this remoteness test as a basis for the holding in this case.

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[9] The lower courts have read *Gutierrez* and *Victory Carriers* to exclude injuries on land if they are too remote from conduct on a vessel in navigable waters. See, *e.g.*, *Margin v. Sea-Land Services*,

Great Lakes argues that no true dispute about causation is present here because the Court should rely on the allegations of causation in the pleadings: "the appropriate inquiry is whether the claims prompting the vessel owner to seek limitation of liability allege that his vessel caused damage or injury." G.L. Br. 16. But Great Lakes also acknowledges that a court cannot confine its jurisdictional inquiry to the pleadings when facts essential to jurisdiction are disputed; the case on which it principally relies, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), makes that clear. *Gwaltney* involved the jurisdictional requirement that a plaintiff establish standing to bring suit; the Court there held that good-faith allegations of standing, while enough to allow a case to go forward, must be proven if they are contested. *Id.* at 65-66. The Court amplified on this rule in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992): "Since [factual allegations establishing standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 2136. Thus, when factual allegations necessary to confer jurisdiction on a federal court are disputed, they must be proven at trial.

Here, as we point out in our opening brief, proximate causation is hotly contested—in fact Great Lakes denies that its vessels caused damage ashore. Thus, this issue will have to be tried. The problem here, which Great Lakes does not address, is that under *Crowell v. Benson*, 285 U.S. 22 (1932), if the trier of fact finds that no conduct on navigable waters caused the injuries for which recovery is sought, the federal court will have no authority to adjudicate in admiralty what would otherwise

Inc., 812 F.2d 973 (5th Cir. 1987); *Crotwell v. Hackman-Lewis Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984); *Pryor v. American President Lines*, 520 F.2d 974, 978-80 (4th Cir. 1975), cert. denied, 423 U.S. 1055 (1976).

be a state-law case. Just as *Gwaltney* and *Defenders of Wildlife* read Article III to require proof of the jurisdictional facts alleged to establish standing, *Crowell* requires proof of jurisdictional facts to support Article III admiralty jurisdiction. See 285 U.S. at 54-56. Thus, if Great Lakes prevails at trial on causation, it will destroy the jurisdictional and constitutional basis for hearing this case in federal court. Great Lakes' construction of the Act—that a federal court cannot authoritatively ascertain its jurisdiction until after trial on the merits—is the very result that *Sisson* counsels to avoid and should for that reason be rejected.[10]

Our construction of the phrase "caused by" in the Extension Act, by excluding remote injuries, minimizes this problem. That construction is supported not only by *Sisson*, *Victory Carriers*, and *Gutierrez*, but also by *Askew* and *Huron Portland Cement*. In those cases, too, the Court rejected an expansion of federal jurisdiction to every injury ashore allegedly caused by a vessel on navigable waters. That rejection makes good sense in light of the problems of federalism and pragmatic application that would be created by an expansive reading of the phrase "caused by" in the Act.

Great Lakes misapplies our test to several hypothetical situations in an effort to discredit it. Each of the hypotheticals offered is within the scope of Extension Act jurisdiction under the test we advocate, no less than under Great Lakes' test. As we explain in our opening brief, we read *Gutierrez* and the other Extension Act precedents to find claims of causation too attenuated when the injury is remote in both time and place from wrongful conduct on a vessel. See Chicago Br. 44-45. On the facts hypothesized by Great Lakes—a vessel strikes

[10] Great Lakes correctly notes (G.L. Br. 15-16) that it may plead in the alternative—denying proximate causation yet seeking limited liability. See Fed. R. Civ. P. 8; Fed. R. Civ. P. Supp. F(2). Our point is not that Great Lakes has pled improperly; rather it is that admiralty jurisdiction cannot be made to depend on the merits of proximate causation.

a levee causing flooding downstream, and a fire spreads inland from navigable water (see G.L. Br. 23)—the injury is remote in place but not time. Hence, these are admiralty cases under the test we urge. These manufactured cases, however, say nothing about the propriety of admiralty jurisdiction in this case. Here the injury on land is remote in both time and place from Great Lakes' pile driving on navigable water. Such a case stretches the phrase "caused by" too far to come within admiralty jurisdiction.

III. THE *SISSON* TEST DOES NOT SUPPLY ADMIRALTY JURISDICTION HERE.

In our opening brief, we remain faithful to *Sisson*'s direction that courts applying the test for admiralty jurisdiction should not attempt to identify the underlying "source" or "cause" of the injury for which recovery is sought. 497 U.S. at 363, 365. In this case, our characterization of the "incident"—the flooding of building basements in the Chicago Loop—is the only one that avoids inquiry into disputed questions of causation. The flooding is what harmed the plaintiffs; all other proffered versions focus on what may or may not have set in motion the chain of events culminating in harm to them. Just as the relevant incident in *Sisson* was the fire and not its cause—the defective washer/dryer—here the incident is the flood, not its cause. Similarly, the only proper characterization of the "activity giving rise to the incident" is the City's management of the tunnel—it was the damaged tunnel that allowed water to reach and thus injure plaintiffs. Again versions that focus on what may have caused the damage to the tunnel are not appropriate.

This focus on the merits of proximate causation is just one of the problems with Great Lakes' submission that "[t]he incident is the alleged negligent replacement of the dolphins, and the activity that gave rise to that is Great Lakes' maritime repair work on navigable water." G.L. Br. 30. The other problem, of course, is that Great Lakes' version telescopes into one thing what *Sisson* describes as two separate things, one preceding the other—

an "incident" (497 U.S. at 363) and an "activity giving rise to the incident" (*id.* at 364).

Great Lakes rejects our characterization of the incident and activity for two reasons. First, it claims that the Extension Act makes damage on land irrelevant to jurisdictional analysis. See G.L. Br. 24-25, 29-30. We explain above that this Court has rejected the claim that the existence of injury ashore is irrelevant to jurisdictional analysis at least three times. See *supra* at 4-6. Second, Great Lakes argues that *Sisson* does not define the relevant incident in terms of the "specific damage [that] was caused." G.L. Br. 25. But *Sisson* did focus on the event that damaged the plaintiff's property—"a fire on a vessel docked at a marina in navigable waters" (497 U.S. at 363)—rather than on the wrongful act that set in motion a chain of events culminating in the fire. Here, the event that damaged plaintiffs' property was the flooding of their basements; Great Lakes' pile driving was simply the wrongful act that led to that flood.

Great Lakes' main response to our interpretation of *Sisson* is to offer freakish hypotheticals in support of its argument that a test that disclaims inquiry into what caused injuries on land leads to odd results. For example, Great Lakes is correct that, in our view, there would be federal jurisdiction under *Sisson* if negligently placed pilings come loose and block a navigable channel, but not if the pilings block a pipe and flood a building inland. See G.L. Br. 24. Similarly, there is no threat to maritime commerce, and thus admiralty jurisdiction, if embers from a fire aboard the yacht in *Sisson* had been borne inland by the wind to start a fire. And our reading of *Sisson* forecloses admiralty jurisdiction if a vessel's allision with a bridge somehow cracks an underground tunnel and eventually causes flooding inland. See G.L. Br. 30. These results are required in order to adhere to *Sisson*'s admonition to separate the jurisdictional inquiry from the merits of proximate causation.

Perhaps some of Great Lakes' hypotheticals—such as the vessel that allides with a bridge causing a flood on

land—should be within admiralty jurisdiction. If that is so, the problem lies not in any flaw in our reading of *Sisson*, but in applying *Sisson* to injuries on land. It should come as no surprise that the *Sisson* test does not work well in such cases: the test was crafted for cases in which all relevant entities are engaged in maritime activities on navigable water, not cases where questions arise about how conduct on the water affects events ashore. If anything, Great Lakes' hypotheticals demonstrate how unsatisfactory the *Sisson* test is in cases involving land-based injuries and parties. For this reason, we urge the Court to use a different jurisdictional test for such cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND OTHER AUTHORITY

Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER JEROME B. GRUBART, INC.

ARGUMENT

I.

A JUST AND PROPER ADMIRALTY JURISDICTIONAL INQUIRY IS NOT ACHIEVED BY MECHANICAL APPLICATION OF *SISSON*, OR BY RELIANCE ON VESTIGIAL JURISDICTION FORMULAE.

A. A *Kelly* Examination Is Harmonious With *Sisson*.

The issue presented by this case is whether *only* the three questions raised in *Sisson v. Ruby*, 497 U.S. 358 (1990), may be asked in every instance to determine whether admiralty jurisdiction is appropriate. The mechanical, unbending application of the *Sisson* test by the Seventh Circuit is questioned by the petitioners in the face of a materially different factual situation than was present in *Sisson* or its predecessors. Respondent Great Lakes Dredge & Dock Company ("Great Lakes") seeks to make this case one of water-based parties versus land-based parties. It consequently says little, if anything, about the entities' differing activities and clamors against further re-examination of the *Sisson* test or its sterile application, no matter what the situation. Great Lakes' amicus, the Maritime Law Association ("MLA"), urges re-examination of *Sisson* even while it exhorts the Seventh Circuit's "faithful application" of it. Despite proven problems with *Sisson* in complicated factual scenarios as now before the Court, both Great Lakes and its amicus resist a totality of the circumstances approach first enunciated in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1974), *cert. denied*, 416 U.S. 969 (1974), and followed by most of the Circuits after *Sisson*.[1]

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[1] Contrary to Great Lakes' claim, Grubart has not urged abandonment of the *Sisson* test, and, in fact, has maintained all along that *Sisson* and *Kelly* are compatible with one another. It is the Seventh Circuit that rejected this reasoning and suggested

(continued...)

The three-pronged, situs/nexus test of *Sisson v. Ruby*, 497 U.S. 358 (1990), developed from what arguably was a much simpler test to apply—the strict locality test. The locality test was discarded by this Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), when its mechanical application generated absurd results. Great Lakes now envisions mass confusion in the lower courts if the purported imprecision and vagueness of a totality of the circumstances test, or any part of it, is allowed to infiltrate what it proclaims is a more practicable test, the *Sisson* three-pronged formula. *See* Resp. Br. 41. One wonders how it would have reacted in *Executive Jet* to the argument that the situs test should be augmented by a

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[1] (...continued)

that *Kelly* does not survive *Sisson*. *See Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993). Great Lakes was also a strong proponent of the compatibility of the two tests when it wanted to downplay the existence of a conflict among the Circuits:

> 1. "The *Kelly* test is simply an articulation of factors that may be, but after *Sisson* are not always, part of the general characteristics of the relevant activity." Brief for Respondent in Opposition at 13;
>
> 2. "Each of the Circuits which refer to the *Kelly* factors subjects each factor to this 'general characteristics' crucible as required by *Sisson*." *Id.* at 13-14;
>
> 3. "[W]hether or not the Seventh Circuit specifically identified each of the *Kelly* factors, the substance of the analysis, and the result yielded, is the same through adherence to *Sisson's* principles." *Id.* at 14; and
>
> 4. "This Court has acknowledged that these approaches are by no means incompatible." *Id.*

After certiorari was granted, Great Lakes reversed itself. Like the Seventh Circuit, it now claims that the *Kelly* inquiries are inappropriate after *Sisson*. Great Lakes Response Brief 36-37 ("Resp. Br.").

nexus prong—the original locality test contained as clear a jurisdictional line as one could ask for under the circumstances, but it was not equal to the task of addressing the "perverse and casuistic borderline situations" faced by the courts. *See Executive Jet*, 409 U.S. at 255. Those difficult scenarios will continue to plague the dockets and, unless one wants to resurrect inequities such as were engendered by the strict locality test, they require flexibility and reason, not rigidity and rote, in the jurisdictional analysis. This is the process the Court has pursued; it should not retreat from it because of an improvident demand for expediency.

Identification of a federal interest in the protection of maritime commerce has always been at the forefront of the nexus test, whether under *Sisson* or a totality of the circumstances approach such as *Kelly*. Great Lakes completely ignores this rationale. Neither the Seventh Circuit nor Great Lakes has identified what that interest is. Both are willing to assume such an interest follows *a fortiori* from *Sisson*. When properly applied that should be the case. But, in the difficult factual scenario, and certainly when the parties and the courts are in substantial disagreement over what constitutes the "incident" and the "activity" under *Sisson* (*see* n.3, *infra*), prudence and reason dictate that such an interest not be so lightly assumed and that the inquiry not be so narrowly confined.

The petitioners and the amicus for Great Lakes all see a problem with an admiralty jurisdiction test comprised solely of the three *Sisson* questions. Great Lakes, undoubtedly motivated by the result below, alone professes satisfaction with that test as applied by the Seventh Circuit. Ensconced with its Seventh Circuit ruling, Great Lakes insists without convincing explanation that the breadth provided by *Kelly* is not only unnecessary, but that it is imprecise

and manipulable. That argument rings hollow when Great Lakes must refer to *Sisson* as applied in this case as its model of clarity and precision.

Consider how Great Lakes has misemployed and manipulated the *Sisson* test in this litigation. In the Court of Appeals, it characterized the activity as pile driving from barges in a navigable channel. Ct. App. Br. of Great Lakes at 23. It did not explicitly define the incident, but discussed the potential impact on maritime commerce as arising from the pile driving work (*Id.* at 16-17, 37-38), so for all practical purposes, Great Lakes' view of the incident was the same as its activity.[2] In this Court, Great Lakes adopted the Seventh Circuit's notion of the two prongs: the activity was pile driving in a riverbed (Br. in Opp. at 12, 18) and the incident became *negligent* driving of pilings into a riverbed (*Id.* at 10-11, 18).

After this Court granted its writ of certiorari, Great Lakes re-evaluated its position; its chameleonic "activity" is now significantly generalized to the bootstrapping phrase, "maritime repair work." Resp. Br. 8, 28, 30. Its statement of the incident remains elusive—it is either "pile driving operations" (*Id.* 7) or *negligent* replacement of the dolphins (*Id.* 30), depending on where in the argument one happens to be. Great Lakes' interchanging highlights the error of the Seventh Circuit's construction of activity and incident. The fact remains that the Seventh Circuit mischaracterized the two concepts and compounded that error by making them equivalents.[3]

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[2] At oral argument, however, Great Lakes repeatedly insisted that the incident was the flood.

[3] Each of the parties before the Court has its own version of the activity and incident. Grubart has defined the activity as bridge (continued...)

Is there any wonder why the lower courts have found it necessary to rely on additional guidelines to establish the presence or absence of a significant relationship to maritime commerce activity? This matter amply illustrates the pitfalls of relying on the characterizations of incident and activity as the sole nexus criteria for admiralty jurisdiction, even before one adds the complexity of parties engaged in different activities.

Even the MLA recognizes the limitation of *Sisson* in the difficult situation. It predictably seeks a mechanical test to ensure the broadest possible boundaries for admiralty jurisdiction, if not through *Sisson*, then by its "modified situs test." The MLA's inclination is to abandon completely the nexus component and adopt a new bright-line test requiring only a vessel on navigable water. But that formulation was explicitly rejected in *Sisson* because it would not necessarily implicate a federal maritime interest. 497 U.S. at 364 n.2. The wisdom of that rejection is validated by the instant

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[3] (...continued)
maintenance or repair and the incident as the breach of an underground tunnel. The City of Chicago ("City") says the activity is the operation and maintenance of the underground tunnel and the incident is the flooding of downtown building basements. The MLA leaves no stone unturned in striving to portray this as a maritime matter. Its activity is the "anchoring or mooring of a vessel to perform work in a navigational channel" (MLA Br. 16), and the incident is "a commercial vessel's perforation of a submerged tunnel structure, which drained substantial water from a navigable river, flooded the tunnel, communicated damage to nearby shore structures and disrupted maritime commerce by closing a navigable waterway to all maritime traffic." (*Id.* 15). Thus, the MLA's definition of the incident, when stripped of its pretextual ornamentation, bears a striking resemblance to Grubart's and none at all to the Seventh Circuit's characterization. That anomaly does not dissuade the MLA from asserting that the Court of Appeals made a "faithful" application of *Sisson*. *See* MLA Br. 13.

situation and numerous other cases where no maritime interest was implicated even though a vessel on navigable waters was involved.[4]

Creation of a completely new test is not the answer, nor is it necessary. Contrary to the remonstrations of Great Lakes and the MLA, the Circuits, except for the Seventh, *have* been able to discern when a broader *Kelly* inquiry is appropriate without encountering the vexing dilemmas discomforting the respondent and its amicus.[5] It should also

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[4] *See, e.g., Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987) (diving injury off pleasure boat), *cert. denied*, 484 U.S. 1027 (1988); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993) (diving injury off houseboat); *Penton v. Pompano Construction Co.*, 976 F.2d 636 (11th Cir. 1992) (construction worker injured in dismantling of equipment off barge); *LaMontagne v. Craig*, 817 F.2d 556 (9th Cir. 1987) (defamatory letter written from aboard a ship); *Sohyde Drilling & Marine Co. v. Coastal Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981) (property damage from well-blowout on submersible drilling barge), *cert. denied*, 454 U.S. 1081 (1981).

The MLA's modified situs test would also have led to a different result in a long line of asbestos cases involving ship workers where the Circuits are in unanimous agreement that there is no admiralty jurisdiction because of a lack of substantial maritime connection. *See, e.g., Austin v. Unarco Indus., Inc.*, 705 F.2d 1 (1st Cir. 1983), *cert. dismissed*, 463 U.S. 1247 (1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); *Eagle-Picher Industries, Inc. v. United States*, 846 F.2d 888 (3d Cir. 1988), *cert. denied*, 488 U.S. 965 (1988); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 474 U.S. 970 (1985); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992).

[5] It is difficult to reconcile how the MLA can suggest a new jurisdiction test in the face of near universal adoption of *Kelly* (with or without reference to *Sisson*) by the courts. *See* MLA Br. 10-11, (continued...)

have been done here—*Sisson* inherently requires such accommodation.

This Court has said that an indictment of the strict locality test was the number of times exceptions were made to it. *Executive Jet*, 409 U.S. 249, 259. A similar criticism of *Sisson* flows from the fact that few courts have been able to rely on it alone for guidance in the jurisdictional inquiry. The MLA candidly concedes that no federal court (except the Seventh Circuit) and only a few state courts have been able to apply *Sisson* without the support of a *Kelly*-like analysis. *See generally* cases cited at MLA Br. 11 n.9. Furthermore, to the extent there is confusion below, it lies with the proper application of the *Sisson* nexus prongs and the melding of the *Sisson* inquiries into the established *Kelly* test, not with the *Kelly* test itself. *See* MLA Br. 4; *see generally* cases cited at MLA Br. 11-12 n.10. Clearly, the confusion below emanates from *Sisson*, not *Kelly*. Yet, despite the proven track record of the totality of circum-

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[5] (...continued)
citing, Sinclair v. Soniform, Inc., 935 F.2d 599 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131 (4th Cir. 1991); *Broughton v. Offshore Drilling, Inc. v. South Central Machine, Inc.*, 911 F.2d 1050 (5th Cir. 1990); *Dean v. Maritime Overseas Corp.*, 770 F. Supp. 309 (E.D. La. 1991), *aff'd*, 981 F.2d 1256 (5th Cir. 1992); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1303 (1994), *reh'g granted*, 20 F.3d 614 (5th Cir. 1994); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309 (E.D. Va. 1993); *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103 (E.D. La. 1993); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991); *Fox v. Southern Scrap Export Co.*, 618 So.2d 844 (La. 1993); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312 (9th Cir. 1993); *Antoine v. Zapata Haynie Corp.*, 777 F. Supp. 1360 (E.D. Tex. 1991); *Ozzello v. Peterson Builders, Inc.*, 743 F. Supp. 1302 (E.D. Wis. 1990); *Torres v. City of New York*, 581 N.Y.S.2d 194 (N.Y. App. Div. 1992), *cert. denied*, 113 S. Ct. 1584 (1993).

stances test, the MLA, without explanation, snubs it in favor of a rigid *Sisson* test or a rejected mechanical test. If the MLA wants to scrap *Sisson*, the logical alternative is already in place and in widespread use by the other Circuits.

A predictable, quick-fix admiralty jurisdiction test for every situation as imagined by Great Lakes and the MLA is not possible unless one is willing to compromise the inquiry for a federal maritime interest. Grubart has stated that a mechanical *Sisson* test might suffice in simple or obvious traditional maritime circumstances; there are simple, clear situations where even a strict locality test might suffice. But that does not mean that such tests should stand as bulwarks against thought and reason.

What is needed is a fair and workable test for every situation, including the complicated one. *Sisson* can be that test *if* it is properly construed to include considerations articulated under the totality of the circumstances test. The more expansive inquiry lessens the risk of error and de-emphasizes the search for *Sisson* definitions which are manipulable and susceptible to widely divergent interpretation, as exemplified by this litigation. The broader *Kelly* approach also takes into account the interests of all the relevant parties and entities, not just those who will contribute to a finding of maritime jurisdiction. Lastly, the multi-faceted examination of *Kelly* provides the flexibility necessary to forestall yet another visit to this Court to define the boundaries of admiralty jurisdiction while at the same time avoiding the return to rejected principles that would sacrifice justice for sophistic simplicity.

B. The Admiralty Extension Act Does Not Address How The Different Types Of Activity Affect The Jurisdictional Nexus Test.

Great Lakes has made the Admiralty Extension Act, 46 U.S.C. § 740, its salvation for every exigency represented by the non-maritime parties in this matter. Great Lakes is right to think that the land-based injuries here will require application of the Extension Act if the jurisdiction test is otherwise satisfied, but wrong to presume that injured parties can have no role in the independent nexus analysis because of their land status.

Great Lakes initially attempts to disqualify the injured land-based parties here by asserting that *Sisson's* footnote 3 reference to "instrumentalities" was not intended to be synonymous with "parties." Resp. Br. 31, *citing* 497 U.S. at 365 n.3. That is directly refuted by *Sisson* in its footnote 4:

> We believe that, at least in cases in which all of the relevant *entities* are engaged in similar types of activity (*cf. n.3, supra*) the formula . . . .

497 U.S. at 366 n.4 (emphasis added).[6] Second, Great Lakes argues that injured parties like Grubart have no relevant role in the nexus inquiry because they were not "involved in bringing about (being instrumental in) the alleged wrong." Resp. Br. 31. Great Lakes is clearly correct in its admission that such injured parties did not bring about the wrong, but this Court in *Sisson* never limited the relevant "entities" or "instrumentalities" to the tortfeasors, nor did it exclude injured parties from the inquiry. After all, unless one wants to become mired in the question of proximate cause (*Sisson* admonishes against such an inquiry at the

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[6] The Court's meaning is also clear to Great Lakes' amicus. The MLA interchanges "instrumentalities" with "parties" while discussing the *Sisson* footnotes. *See* MLA Br. 16.

jurisdictional stage, 497 U.S. at 365), the injured parties in *Sisson*, the marina and the other boat owners, were not any more instrumental in bringing about the alleged wrong (Sisson's vessel fire) than Grubart and thousands of others were in contributing to the tunnel breach.

Thus, *Sisson* established a role for its land-based injured party (the marina) in its nexus analysis, but that party happened to be engaged in the same type of activity as the boat owner (storage and maintenance of vessels). Great Lakes realizes this: "*Sisson* itself involved damage to 'water-based' parties (the other yachts) and a 'land-based' party (the marina)." Resp. Br. 37. Great Lakes is so captivated by the injured parties' distant location in this matter that it cannot see past that point to the differing activity also represented by the City and parties such as Grubart. Consequently, Great Lakes is unable or unwilling to differentiate "land-based" from "non-maritime" and ignores examination of how the differing activities of the parties in this matter affect the nexus inquiry.

Clearly, a land-based injured party can have a role in the *Sisson* nexus inquiry. If an injured party in *Sisson* appeared to have a stronger connection to the "activity" than Grubart and the City do here, it is precisely because the *Sisson* entities, like those in *Executive Jet* and in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), were engaged in a common activity. That the injured parties in the case at bar have less of an affiliation with a maritime activity than the injured parties had in *Sisson* is undeniable and only serves to highlight the question raised, but not answered, in footnotes 3 and 4 of *Sisson*. Even if Great Lakes is found to have engaged in a maritime activity, Grubart, thousands of others like it, and the City were not. Without prejudice to Grubart's underlying contention that Great Lakes was not engaged in a traditional maritime

activity, the only difference between the parties in *Sisson* and the instant parties is the difference in their types of activity. There is no support in *Sisson* or anywhere else for excluding a party from the nexus inquiry because of its locality. In fact, the lower courts have regularly examined the relevant entities' different types of activity (maritime vs. non-maritime) under the nexus prong without regard to the situs of a party.[7]

The fallacy of Great Lakes' argument is exposed by its avoidance. Rather than address the obvious different types of activity present, Great Lakes has exploited the injured parties' *locality* to confine their role to the situs prong of the admiralty jurisdictional analysis. Imparting a role for land-based injured parties in the nexus inquiry does not make the situs prong meaningless. Examination of the situs question, and with it, the Extension Act, will not be affected.[8] In a situation where the showing of a substantial federal interest is in the balance, it would be a sham to banish entities and instrumentalities from the nexus inquiry because they are non-maritime in character and role.

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[7] *See, e.g., Eagle-Picher Industries, Inc. v. United States*, 846 F.2d 888 (3d Cir. 1988) (asbestos-related injury to shipworker), *cert. denied*, 488 U.S. 965 (1988); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991) (land-based employee of vessel owner slips while visiting vessel); *Broughton v. Offshore Drilling, Inc. v. South Central Machine, Inc.*, 911 F.2d 1050 (5th Cir. 1990) (vessel damaged by dropped oil-rigging machinery); *Penton v. Pompano Construction Co.*, 976 F.2d 636 (11th Cir. 1992) (construction worker injured in dismantling of equipment off barge onto land).

[8] Grubart has never argued that the mere existence of land-based injured parties mandates a finding of no admiralty jurisdiction.

II.

THERE IS NO INDEPENDENT ADMIRALTY JURISDICTION UNDER THE EXTENSION ACT AND THE LIMITATION ACT.

A. The Issues Have Not Properly Been Raised By Great Lakes.

Great Lakes has not properly raised whether the Admiralty Extension Act, 46 U.S.C. § 740, and the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181, *et seq.*, provide independent grounds for admiralty jurisdiction in this matter. As to the Extension Act, Great Lakes' recitation of the record is not accurate. *See* Resp. Br. 41 n.26. It cited the Extension Act, along with 28 U.S.C. § 1333(1), as the bases for jurisdiction in its complaint (J.A. 31) and in the Seventh Circuit, but never independent of Section 1333(1). *See* Ct. App. Br. of Great Lakes at 4, 38-40; Ct. App. Reply Br. at 4-6, 16-17 ("Great Lakes is not advocating that the Extension Act creates a new cause of action."). *Compare, e.g.*, Ct. App. Br. of Great Lakes at 41 n.10 (referencing Limitation Act only); Ct. App. Reply Br. at 17 (referencing Limitation Act only).[9] The parties have not briefed and

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[9] Moreover, Great Lakes claims that the Seventh Circuit had no reason to discuss whether the Extension Act alone conferred jurisdiction because it found jurisdiction under Section 1333. The court made such a statement with respect to the Limitation Act *but not the Extension Act*:

> Because we conclude that 28 U.S.C § 1333 adequately supports . . . jurisdiction, we do not address Great Lakes' contention that the Limitation Act is an independent source of subject matter jurisdiction.

3 F.3d at 230 n.8. The court's obvious failure to similarly comment about the Extension Act, on this record as explained above, leads to only one conclusion—the court did not believe the issue of independent jurisdiction under the Extension Act was before it.

argued the Extension Act question below, and it should not be raised for the first time in this Court.

As to independent jurisdiction under the Limitation Act, Great Lakes did not raise it in its complaint, but only in its response to Grubart's and the City's motions to dismiss in the district court. (Memorandum In Opposition To Motions To Dismiss at 13 n.8) In the appellate court, cursory mention was made in a single footnote reference (Ct. App. Br. of Great Lakes at 41 n.10) and in its reply brief (Ct. App. Reply Br. of Great Lakes at 17). Until now, the issue has not been suggested to this Court. It is not in Great Lakes' Brief in Opposition, nor is it stated or implied in its Question Presented therein. Lastly, as with the Extension Act, Great Lakes did not cross-petition on this issue. The Court should, in exercising its discretion, refuse to consider those arguments until they are fully argued to the Seventh Circuit and ruled upon. *See, e.g., International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 865 (1987).

B. The Extension Act Does Not Independently Create Admiralty Jurisdiction.

There is no sound reason why federal admiralty jurisdiction should be created under the Admiralty Extension Act ("Act") if the action cannot qualify as a maritime tort using a nexus test. The Act extends admiralty jurisdiction when the injury occurs on land and corrects an inequity created by the strict locality test, which has since been rejected. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Congress enacted the legislation in 1948 to cure the inequities of the then-prevailing judicial interpretation of Section 1333(1) which withheld admiralty jurisdiction when land damage occurred, even though it would otherwise have been an admiralty action. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 and n.8 (1971); *Executive Jet*,

409 U.S. at 260. The Act also permitted shoreside interests to bring suits in admiralty for damage caused by vessels. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 222 (1969).

The Circuits addressing the issue have uniformly held that the Extension Act does not independently create admiralty jurisdiction.[10] Great Lakes practically concedes that its construction of the Act results in the anomaly that torts consummated on land are preferred over torts consummated at sea under existing admiralty law. Resp. Br. 44 n.29. According to Great Lakes, that result is avoided *if* one adopts a new test such as proposed by the MLA and the concurring opinion in *Sisson* (Scalia, J., concurring), imposing maritime jurisdiction for every tort occurring on a vessel in navigable waters. Of course, if such a test should develop, the Extension Act would become meaningless. Great Lakes, earlier in its brief, did "not think this Court should embrace an analysis that would render an Act of Congress [the Extension Act] meaningless." Resp. Br. 12 n.4, *citing Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) and *Rosado v. Wyman*, 397 U.S. 397, 415 (1970).

The Extension Act must be read against Congress' appreciation of the jurisdiction test as it existed in 1948. The Act does not define what an admiralty case is nor is there an indication that Congress intended to define it. If

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[10] *See, e.g., Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981); *Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767 (11th Cir. 1984); *Dean v. Maritime Oversees Corp.*, 770 F. Supp. 309, 319 (E.D. La. 1991), *aff'd*, 981 F.2d 1256 (5th Cir. 1992); *Felix v. Arizona Dept. of Health Services, Goods, Vital Records Section*, 606 F. Supp. 634, 636 (D. Ariz. 1985); *Jorsch v. Le Beau*, 449 F. Supp. 485, 488-89 (N.D. Ill. 1978).

Congress wanted maritime jurisdiction to exist for every tort caused by a vessel in navigable waters, it could have easily said so and dropped the last phrase, "notwithstanding that such damage or injury be done or consummated on land." The inclusion of that language and the legislative history of the Act establish that Congress' purpose was limited to correcting perceived inequities in the strict locality test. The nexus test does not resurrect those problems nor does it impair the legislative objectives embodied by the Act. For these reasons, the Admiralty Extension Act should not be interpreted to confer jurisdiction independent of Section 1333(1).

C. The Limitation Act Does Not Independently Create Admiralty Jurisdiction.

The Limitation of Liability Act was enacted for the purpose of promoting maritime commerce. *Richardson v. Harmon*, 222 U.S. 96, 104 (1911). As previously stated, the Admiralty Extension Act afforded shoreside interests the same opportunity to bring suits in admiralty as was available to vessel owners. Prior to that enactment, the strict locality test prevented those shoreside interests from bringing suits in admiralty for damages caused by vessels engaging in maritime commerce on navigable waters. But for the Court's ruling in *Richardson*, the locality test would also have worked a similar inequity on shipowners seeking to limit their liability under the Limitation Act for land-based injuries caused by their maritime activities, *i.e.*, "non-maritime torts."

In view of its purpose to promote maritime commerce, the Limitation Act was liberally construed in *Richardson* so as to overcome the artificial limitation on admiralty jurisdiction imposed by the strict locality test. In *Richardson*, the owners of a commercial barge were allowed to limit

their liability for damage to a bridge caused by the collision of their barge with a bridge abutment, even though, under the admiralty jurisdiction test of the day, the claim was not otherwise cognizable in admiralty. As Congress was to realize and correct decades later, a quintessential maritime activity could be transformed into a non-maritime action simply by the existence of land-based injuries.

Great Lakes makes much ado about the proposition that the Extension Act was not a response to *Richardson*, and, therefore, *Richardson* survives. The legislative history of the Extension Act makes clear that it was more a response to cases such as *Martin v. West*, 222 U.S. 191 (1911), where it was held that maritime jurisdiction did not extend to cover losses on land (*Martin* also involved a vessel-bridge collision, but not the Limitation Act), even if the cause of the loss originated on a navigable waterway. *See* Sen. Rep. No. 1593, 1948 U.S. Code Cong. & Adm. News, p. 1899; *see also, Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 and n.8 (1971); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 260 (1972). Regardless of the relationship to *Richardson*, however, the result is the same. The Court in *Richardson*, and later Congress through the Extension Act, removed the locality of the injury as an impediment to a finding of admiralty jurisdiction for torts clearly arising out of traditional maritime activities. Therefore, the Extension Act need not be viewed as a response to *Richardson* for the statute to have eliminated the reason and need for the rule established by that case.

The advancement of a competitive American shipping industry is not impeded by requiring that a claim also have a substantial relationship to traditional maritime activities as required by *Executive Jet*, *Foremost*, and *Sisson*. The Limitation Act's purpose of promoting commercial shipping is the same as, or at the very least, is a subpart of, the

same federal interest in the protection of maritime commerce that is the cornerstone of the totality of the circumstances test (or liberal *Sisson* test) urged by Grubart. Under that jurisdictional test, consideration of the activities of non-maritime entities and instrumentalities will or will not lead to identification of a federal interest sufficient to justify invocation of admiralty jurisdiction. If such a comprehensive analysis does not identify a significant relationship to traditional maritime activity, there is no other federal interest capable of justifying application of the Limitation Act.

Great Lakes argues that it is entitled to limitation of liability and independent admiralty jurisdiction even when a *Kelly* or *Sisson* jurisdictional inquiry identifies no substantial federal interest. At least five other Circuits, including the Seventh Circuit, disagree and have held that the Limitation of Liability Act does not independently support admiralty jurisdiction.[11] The concept of "non-maritime torts" in *Richardson* is no longer current under contemporary jurisdiction tests and to apply *Richardson* as if it is would be an absurdity. Insistence on federal jurisdiction in such situations does not further the purposes of the Limitation Act and only serves to unfairly make injured parties the subsidizers of shipowners' tortious conduct.

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[11] *See, e.g., David Wright Charter Services, Inc. v. Wright*, 925 F.2d 783, 785 (4th Cir. 1991); *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115 (5th Cir. 1992); *In re Complaint of Sisson*, 867 F.2d 341, 348-350 (7th Cir. 1989), *rev'd on other grounds*, 497 U.S. 358 (1990); *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 921 F.2d 775, 779-80 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 272 (1991); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1052-54 (11th Cir. 1989).

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be reversed and the judgment of the district court, denying admiralty jurisdiction, should be reinstated.

Respectfully submitted,

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July 11, 1994

Nos. 93-762 and 93-1094

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY
and JEROME B. GRUBART, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in the absence of a substantial federal maritime interest in providing a uniform rule of decision, a federal court has admiralty jurisdiction over a tort which causes damage only to non-maritime parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The issue in this case—whether the federal admiralty jurisdiction extends to a traditional state law tort—is of fundamental importance to *amici*.

As the Court recognized in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Constitution "empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits." *Id.* at 360-61 (quoting *Crowell v. Benson*, 285 U.S. 22, 55 (1932)). Because a federal court, sitting in admiralty, has the power to create maritime rules of decision which displace those of the State, it is of fundamental importance to the federal-state balance that admiralty jurisdiction be limited to those situations where there is a substantial federal maritime interest in providing a uniform rule of decision.

Because of the importance of this issue to *amici* and its members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt the statement of petitioner City of Chicago.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The purpose of the Constitution's grant of the admiralty jurisdiction to the federal courts is to provide a uniform body of law where there is a substantial federal interest in protecting maritime commerce. *See American Dredging Co. v. Miller*, 114 S.Ct. 981, 987 (1994); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982). It is this fundamental purpose—the need to protect maritime commerce through the application of uniform rules—which must animate the jurisdictional inquiry. Our system of federalism requires that in the absence of such a need, federal courts must decline to exercise the admiralty jurisdiction.

The Court has long recognized that "the State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Romero*, 358 U.S. at 374 (1959). Thus, under the Commerce Clause, the Court has frequently recognized the power of the States to regulate maritime matters which are of local concern. *See, e.g., Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1882); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). Likewise, even when the Court has exercised its power under the jurisdictional grant "to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits," *Romero*, 358 U.S. at 361 (quoting *Crowell v. Benson*, 285 U.S. 22, 55 (1932)), it has repeatedly recognized the role of the States in providing rules of decision where there is no compelling need for a uniform federal rule. *See, e.g., Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); *Madruga v. Superior Ct. of Calif.*, 346 U.S. 556 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924).

The jurisdictional inquiry in all admiralty cases should be guided by this same principle. But it is of particular

importance in a case such as this one which arises under the Admiralty Extension Act because it involves a tort which "state law has traditionally governed" and "raise[s] difficult questions concerning the extent to which state law would be displaced or preempted." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971). Accordingly, federal courts must be sure that the assertion of admiralty jurisdiction is consistent with its fundamental purpose. *See Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990); *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S.Ct. 2071, 2074-75 (1991). In determining whether admiralty jurisdiction exists in Admiralty Extension Act cases, a court should examine the complaint to identify "the conduct alleged to have caused" the tort and ask whether there is a substantial federal maritime interest in providing a uniform rule of decision for the tortious conduct at issue. *See Foremost*, 457 U.S. at 675. In the absence of such an interest, a federal court must decline to exercise the admiralty jurisdiction.

2. Great Lakes asserts that pile driving is the relevant activity for purposes of the jurisdictional inquiry and, as such, is a traditional maritime activity subject to admiralty jurisdiction. Pile driving does not implicate the need for a uniform rule of decision, however. And while Great Lakes asserts the existence of "a century of cases applying admiralty jurisdiction to the installation and repair of pilings in navigable bodies of water[,]" Opp. Cert. 12, the most these cases can be said to stand for is that vessels which engage in pile driving also engage in other functions (such as navigation and the employment of seamen) which require uniform rules of decision and thus have been traditional concerns of the admiralty courts.

In contrast to the absence of any tradition of admiralty courts hearing disputes involving damage to other structures caused by tortious pile driving, state courts have long heard disputes of this kind. *See, e.g.*, 7 Stuart M. Speiser, *et al.*, *The American Law Of Torts* § 19:16 (1990) (collecting state court cases). This common construction tort is far removed from the maritime law's traditional concern of protecting the shipping industry and traders by providing a legal system which assures that the same conduct will have similar legal consequences throughout the world. *See American Dredging*, 114 S.Ct. at 990.

The general absence of federal maritime regulation governing pile driving is further evidence that there is no substantial federal maritime interest in providing uniform rules to govern the tortious conduct at issue. The tort here thus stands in stark contrast to the vessel collision in *Foremost*, which was governed by a federal statutory enactment that required uniform administration by the federal admiralty courts. *See* 457 U.S. at 676 (citing the Rules of the Road, 33 U.S.C. §§ 2001 *et seq.*).

ARGUMENT

I. EXERCISES OF THE FEDERAL ADMIRALTY AND MARITIME JURISDICTION MUST BE GUIDED BY THE NEED TO ENFORCE UNIFORM RULES

As several commentators have noted, the framers' decision to vest in the federal courts the judicial power over "all [c]ases of admiralty and maritime [j]urisdiction," U.S. Const. art. 3, § 2, received little attention and appears to have been uncontroversial. *See* Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L. Rev. 661, 669-71 (1963) (*Erie At Sea*); Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 Cornell L. Q. 460 (1925); Wright, *Uniformity In The Maritime Law Of The United States*, 73 Penn. L. Rev. 123, 128 (1925) (*Uniformity In The Maritime Law*). Perhaps the best explanation for why this was so is that at the time of the Convention, there was already in existence "the traditional body of rules, precepts and practices known . . . as the maritime law," 1 Steven F. Friedell, *Benedict on Admiralty* § 104 (7th ed. 1993), which, while "more or less incomplete and imperfect, no doubt,

and with variations from place to place, . . . prevail[ed] generally throughout the civilized maritime world, more striking in its similarities than in its local differences, and at all events much more uniform than the purely local law of the countries enforcing it." *Uniformity In The Maritime Law*, 73 Penn. L. Rev. at 127.

The maritime law "follow[ed] the trader, br[inging] about like legal consequences . . . wherever he might go and into whatever commercial court he might be drawn, willingly or unwillingly." *Id.* It was thus recognized as being "not the law of a particular country, but the general law of nations," *Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617-18 (K.B. 1759) (opinion of Lord Mansfield, C.J.); its international scope required uniformity in application. *See Uniformity In The Maritime Law*, 73 Penn. L. Rev. at 127; Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 Supreme Ct. Rev. 158, 163-64 (*Federalism and the Admiralty*) (noting that the existence of the general maritime law "served to minimize any state objections to national power in this field; and because of the innumerable contacts with foreign interests, unequalled in land transactions, the preservation of harmony between our law of the sea and those of other nations was a strong desideratum").

While the framers' decision to grant the federal courts the admiralty and maritime jurisdiction prompted little debate, it seems clear that this was because the maritime law was understood as being part of the law of nations. As such, the maritime law required uniformity in its application. As Professor Stolz has noted, "Hamilton, Madison, Randolph, and Wilson all spoke in terms of the impact on foreigners and the necessity of a uniform system of law." *Erie at Sea*, 51 Cal. L. Rev. at 670 (footnotes omitted).

For example, in The Federalist No. 80, Hamilton wrote:

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend upon the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[2]

Id. at 447 (Isaac Kramnick ed., 1987). Madison, in discussing the various jurisdictional grants contained in Article III, stated:

> If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure uniformity. . . . To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can only be done by giving the federal judiciary exclusive jurisdiction. Controversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals.

3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (2d ed. 1907). Wilson likewise recognized that "the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, [and] to a scene in which controversies with foreigners would be most likely to happen." 1 Max Farrand, *The Records of the Federal Convention of 1787* 124 (1966).

The contemporaneous statements of the framers thus demonstrate that the purpose of federal admiralty juris-

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[2] "The 'public peace' was a reference back to Hamilton's earlier statement 'that the peace of the WHOLE ought not to be left at the disposal of a PART.'" *Erie at Sea*, 51 Cal. L. Rev. at 670 n.39 (quoting Alexander Hamilton, *The Federalist* No. 80 at 446 (Isaac Kramnick ed., 1987)).

diction "was the protection of merchants, notably foreign traders, by having a uniform law administered by the federal courts." *Erie at Sea*, 51 Cal. L. Rev. at 670; *see also Federalism and the Admiralty*, 1960 Supreme Ct. Rev. at 163-64; 1 *Benedict on Admiralty* § 105.[3] To be sure,

[3] *Amici* note that a recent scholarly commentary criticizes many leading authorities for interpreting the jurisdictional grant based on a paradigm of private litigation when the framers considered such matters unimportant. *See* Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117, 118, 138 & n.110 (1993). Professor Casto argues that the framers' principal concern was to provide courts competent to adjudicate such matters of sovereign interest as prize cases, crimes committed on the high seas, and revenue cases, not to adjudicate private disputes. *Id.* Indeed, it is quite significant that when, in 1790, Congress asked Attorney General Edmund Randolph (a former governor of Virginia and judge on that State's admiralty court) to conduct a study of the federal judiciary, Randolph reported that "a federal forum for the resolution of private maritime disputes was not needed because 'in [these cases], the State Legislature may establish a jurisdiction reaching the vessel itself.'" *Id.* at 121 (quoting H.R. Rep. 1st Cong., 3d Sess. (Dec. 31, 1790), *reprinted in* 1 *Am. State Papers: Miscellaneous* 21 (W. Lowrie & W. Franklin eds. 1834)). According to Casto, Randolph's view that the existence of federal admiralty jurisdiction is dependent not upon "the nature of the remedy" sought but "the substance of the underlying dispute," *id.* at 122, was the accepted understanding of the "Founding Generation." *See id.* at 122-44. The structure of the Judiciary Act of 1789, 1 Stat. 73, manifests the framers' understanding that private maritime disputes were not significant to federal interests by vesting exclusive jurisdiction over prize, criminal and revenue cases in the federal courts while "saving to suitors" the right to bring private suits in the state courts. *Id.* at 144.

Subsequent events have, of course, led the Court to view Article III's jurisdictional grant as conferring on the federal courts the power to engage in "federal common lawmaking in admiralty" to preserve the uniformity of maritime law in disputes involving private interests. *American Dredging*, 114 S.Ct. at 989; *see also Romero*, 358 U.S. at 374. Nonetheless, Professor Casto's analysis counsels for a restrained approach in determining whether the federal admiralty jurisdiction should be exercised. *Cf. American Dredging Co.*, 114 S.Ct. at 992 (Stevens, J., concurring).

the need for a uniform body of maritime law is not limited to those disputes which arise out of the foreign trade but arises wherever there is a national interest in protecting maritime commerce by applying uniform rules. *See, e.g., Foremost*, 457 U.S. at 674-77. This fundamental purpose—the need to apply uniform federal rules—must animate the inquiry into whether federal courts should exercise admiralty jurisdiction.

As the Court has recognized, the "[m]aritime law is not a monistic system" which always requires the application of uniform federal rules. *Romero*, 358 U.S. at 374. To the contrary, "[t]he State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Id.; see also Huron Portland Cement*, 362 U.S. at 442 ("[T]he states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.").

The First Congress, for example, recognized that maritime pilotage was not the type of subject matter requiring uniform federal rules but was a local concern which was properly the subject of state regulation. *See* Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 54. And the Court recognized as much in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852), when it rejected a challenge to this scheme:

> [T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

The state compulsory pilotage statute at issue in *Cooley* was, of course, expressly authorized by Congress. Nonetheless, even in the absence of Congressional authoriza-

tion, the Court has frequently upheld the power of the States and local governments to regulate maritime matters which are of local concern. *See, e.g., Kelly v. Washington*, 302 U.S. 1, 14-16 (1937); *Morgan's Steamship Co. v. Louisiana Bd. of Health*, 118 U.S. 455, 465 (1886); *Packet Co.*, 105 U.S. at 562-63.

For example, in *Packet Co.*, the Court upheld a municipal regulation designating the proper area for steamboat landings. 105 U.S. at 562-64. While acknowledging that the regulation "may seriously affect [vessels] in their business of navigation and transportation," the Court also recognized that "[t]he protection of the shore of the sea or bank of a river on which a town is situated is a necessity to the town, and the washing and crumbling of the bank from the agitation of the waters, made by the landing of large steamers, demand that such regulations should exist." 105 U.S. at 562. The Court thus characterized the regulation as "belong[ing] . . . manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing-places, can be properly made." *Id.* at 563.

In *Morgan's Steamship*, the Court rejected a challenge to Louisiana's quarantine laws which were designed to protect the State, and more particularly, the City of New Orleans, from the spread of contagious diseases, despite the regulatory scheme's potential for disruption of maritime commerce. 118 U.S. at 458-59, 463-64. Analogizing the scheme to pilotage laws, the Court held:

> The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York.

Id. at 465.

And in *Kelly*, the Court upheld a state regulation of the safety and seaworthiness of motor tugboats. 302 U.S. at 14-16. The Court rejected, *inter alia*, a challenge to the scheme on the ground that the subject required uniform federal rules and thus could only be regulated by Congress. *Id.* at 14-15. In so holding, the Court noted that "[a] vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of th[is] principle" of uniformity. *Id.* at 15. *See also Huron Portland Cement*, 362 U.S. at 445-46 (upholding municipal regulation of vessel emissions, in part because matter was a local concern).

To be sure, these cases generally involved challenges to state and local regulation of maritime activity brought under the Commerce Clause. But even when the Court has exercised its power under the jurisdictional grant "to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits," *Romero*, 358 U.S. at 360-61 (quoting *Crowell*, 285 U.S. at 55), it has repeatedly recognized the right of the States to provide rules of decision where there is no compelling need for a uniform federal rule. As the Court explained in *Romero*:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when

> this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

358 U.S. at 373 (footnote omitted).

The Court has thus upheld, *inter alia*, the enforcement of state-created liens, *see Vancouver S.S. Co., Ltd. v. Rice*, 288 U.S. 445 (1933); state wrongful death and survival of action statutes (despite the historic unavailability of such relief in admiralty), *see Just v. Chambers*, 312 U.S. 383 (1941), *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); state laws providing for the partitioning and sale of a vessel, *Madruga*, 346 U.S. 556; state laws authorizing state courts to direct specific performance of arbitration agreements in maritime contracts, *Red Cross Line*, 264 U.S. 109; and state laws regulating the terms and conditions of marine insurance contracts. *Wilburn Boat Co.*, 348 U.S. 310. As the Court noted in *Romero*, "all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity." 358 U.S. at 373-74. *See also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337-44 (1973) (upholding state law imposing strict liability on vessels for damages and clean-up costs caused by oil spills).

The issue in these cases was what substantive law—state or federal maritime—to apply and not what forum was proper to hear the dispute.[4] But of the various grants contained in the allocation of the admiralty and maritime jurisdiction to the federal government, certainly the one with the greatest potential for disruption of the federal-state balance was that which "empowered the federal

[4] Several of these cases were not even brought in the federal admiralty jurisdiction. *See, e.g., Wilburn Boat Co.*, 348 U.S. at 311 (proceeding brought in state court and removed to federal court because of diversity of citizenship); *Madruga*, 346 U.S. at 557 (proceeding brought in state court); *Red Cross Line*, 264 U.S. at 119 (same).

> courts in their exercise of the admiralty and maritime jurisdiction . . . to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits." *Romero*, 358 U.S. at 360-61 (quoting *Crowell*, 285 U.S. at 55).[5]

If the Court, in the exercise of this weighty power, has historically recognized that it is not free to displace state law in the absence of a substantial federal interest in applying uniform rules, then surely the threshold question of whether a federal court may properly exercise the admiralty jurisdiction should be guided by the same principle. As the Court noted in *Romero*, "[h]ere, as is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy." 358 U.S. at 374-75.

Accordingly, in the absence of a substantial federal interest in applying uniform rules of maritime law, federal courts should decline to exercise the admiralty jurisdiction. As a leading commentator has stated:

> Although the lines are not always easy to draw, it would likely lead to more satisfactory results if courts recognized that the purpose of having jurisdiction over maritime affairs is to provide a forum for de-

[5] As the Court recognized in *Romero*:

> Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction" and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

358 U.S. at 360-61 (quoting *Crowell*, 285 U.S. at 55).

veloping a uniform body of law for those aspects of maritime commerce for which there is a substantial federal interest.

1 *Benedict* at § 103; *see also* Black, *Admiralty Jurisdiction: Critique And Suggestions*, 50 Colum. L. Rev. 259, 273 (1950).[6] Not only is such an approach consistent with the framers' understanding of the purpose of the admiralty jurisdiction, *see supra* pp. 6-7, *amici* respectfully submit that our system of federalism requires no less.

The Court, in assessing the precise boundaries of federal admiralty jurisdiction, has generally recognized as much. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), the Court refused to allow a longshoreman to sue in admiralty for an injury incurred while working on a dock. In so holding, the Court stated:

> We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or preempted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts. As the Court declared in *Healy v. Ratta*, 292 U.S. 263, 270 (1934), "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution * * *. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined."

404 U.S. at 211-12.

To similar effect is *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), which, while marking a sea change in the test for federal admiralty jurisdiction, nonetheless reaffirmed the fundamental role of the States under our system of federalism. In holding that an airplane crash into Lake Erie was not cognizable in admiralty, the *Executive Jet* Court rejected the strict locality test under which jurisdiction turned on whether the tort occurred on the navigable waters, and added the nexus test which requires that the tort "bear a significant relationship to traditional maritime activity." 409 U.S. at 268. The Court quoted with approval *Victory Carriers*' recognition that federalism principles must inform the decision to exercise admiralty jurisdiction. *See id.* at 272-73. Because "the Ohio courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors," it was for Congress to decide whether there was a federal interest in having a uniform

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[6] As Professor Black explained, "the fundamental justification . . . for the existence of the separate federal admiralty jurisdiction" is "the national interest in federal judicial supervision of the concerns of maritime and fluvial shipping." *Admiralty Jurisdiction*, 50 Colum. L. Rev. at 273. Professor Black thus proposed that the federal admiralty jurisdiction "should conserve as far as possible the personnel and other resources of the federal judiciary by referring to the jurisdiction of the states, with the usual provision of supervisory federal review where appropriate, those controversies which can be handled as well or better by the state court." *Id.* at 273. *See also id.* at 277 ("The 'amphibious' tort—injury by a maritime to a non-maritime object—might furnish some difficulty, not because of any metaphysical constructions as to tort 'locality' but because there is a legitimate state interest in the safety of property ashore."). *Amici* submit that any jurisdictional difficulty presented by such "amphibious" torts is resolved by limiting federal admiralty jurisdiction to those cases in which there is a substantial federal interest in providing a uniform rule to govern the conduct at issue.

body of law governing these torts. *Id.* at 273-74 (footnotes omitted). In short, because there was no demonstrated federal maritime interest in applying uniform rules of decision to the tort, the suit was to be resolved in the state court under its rules of decision.

The Court's decision in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), marks no change in this course. In *Foremost*, the Court upheld the exercise of admiralty jurisdiction over a collision on navigable waters between two pleasure boats, rejecting a vigorous dissent which argued that in the absence of commercial activity, there was no substantial federal admiralty interest. *See generally* 457 U.S. at 674-77; *see also id.* at 677-86 (Powell, J., dissenting). There was, however, a demonstrated federal maritime interest in exercising jurisdiction over the case, as evidenced by both the long tradition of admiralty courts hearing disputes arising out of vessel collisions and the Rules of the Road, 33 U.S.C. § 2001 *et seq.*, the federal statutory scheme which governs the navigation of all vessels on the navigable waters. *Id.* at 674-76. As the *Foremost* court noted, the federal maritime interest

> can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . . The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Id. at 675 (footnote omitted).

While *Foremost* modified *Executive Jet*'s nexus test, it was consistent with the fundamental purpose of the admiralty jurisdiction—to provide a federal forum to protect the federal interest in the uniformity of maritime law. When, as here, there is no demonstrable federal maritime interest in providing uniform rules regulating the tortious conduct at issue, the exercise of admiralty jurisdiction is inappropriate. As the Court stated in *Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990), when the jurisdictional inquiry is divorced "from the purposes that support the exercise of jurisdiction, it *has* gone too far." Accordingly, "a case must implicate [a federal maritime] interest to give rise to [admiralty] jurisdiction." *Id.; accord Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S.Ct. 2071, 2074-75 (1991).

The foregoing cases demonstrate that the Court's creation of the nexus requirement was born out of the recognition that under our system of federalism, the States share responsibility with the federal government for regulating activities which arguably implicate maritime interests. If the nexus test's requirement that a tort bear a substantial relationship to traditional maritime activity is to prove faithful to the purpose of the admiralty jurisdiction, *see Sisson*, 497 U.S. at 364 n.2; *Exxon*, 111 S. Ct. at 2074, it is because there is a federal maritime interest in providing uniform rules in adjudicating these torts.

It is apparent that important consequences for both federal as well as state interests stem from a court's answering the question whether a tort bears a substantial relationship to traditional maritime activity. It is therefore regrettable that the resolution of this question has been characterized as being "subject to easy manipulation." 1 Benedict at § 171. Indeed, notwithstanding the Court's admonition in *Sisson* "that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose," 497 U.S. at 364, substantial confusion remains

over the precise level of generality at which the relevant activity should be defined.[7]

Sisson's rule may be appropriate where both plaintiff and defendant engage in traditional maritime activity because under such circumstances, it is likely to produce few aberrational results and impose only insubstantial costs on the federal-state balance. But where, as here, most of the parties involved are not maritime actors and jurisdiction is premised on the Admiralty Extension Act, a change in course is warranted.[8] Particularly because cases such as this one involve torts which "state law has traditionally governed" and "raise difficult questions concerning the extent to which state law would be displaced or pre-empted," *Victory Carriers*, 404 U.S. at 212, federal courts must be certain that the assertion of admiralty jurisdiction is consistent with its fundamental purpose. *See Sisson*, 497 U.S. at 364 n.2; *Exxon*, 111 S.Ct. at 2074-75. Accordingly, as *Foremost* teaches, a court should examine the complaint to identify "the conduct alleged to have caused" the tort and ask whether there is a substantial federal maritime interest in providing a uniform rule of decision for the tortious conduct at issue.[9]

[7] *Compare* Br. Am. Cur. Maritime Law Assoc. 6 (in 7th Cir.) (arguing that "[t]he general character of the activity is the anchoring or mooring of a commercial vessel in a navigational channel, or a commercial vessel performing work in a navigational channel") *with* Opp. Cert. Great Lakes 12 (arguing that pile driving is the relevant activity). *See also* 1 *Benedict* at § 171 (noting that while *Sisson* characterized the activity "as storage of a vessel at a marina . . . one could also have characterized the relevant activity as washing and drying clothes or more generally, as recreation").

[8] *Amici* note that *Sisson* itself recognized that "[d]ifferent issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not." 497 U.S. at 365 n.3. This is such a case. *See* Br. of City of Chicago at 22-28.

[9] In *Sisson*, the Court rejected a more particularized inquiry into the circumstances of the incident on the ground that a court "would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." 497 U.S. at 365. *Amici* respectfully submit that just as in *Foremost*, a court need not decide the merits of causation issues to resolve a jurisdictional challenge. *Amici* suggest that a court should examine the complaint to determine "the conduct alleged to have caused" the tort, *see Foremost*, 457 U.S. at 675, assume that conduct proximately caused the tort, and ask the fundamental question of whether that conduct implicates the need for a uniform federal rule. Where there is doubt as to the precise conduct which caused the incident, the court can, of course, defer consideration of a motion under Fed. R. Civ. P. 12(b)(1) until completion of discovery.

See 457 U.S. at 674-77, *see also* 1 *Benedict* at § 103. When, as here, this question must be answered in the negative, a federal admiralty court must decline jurisdiction.

II. TORTIOUS PILE DRIVING IS AN INHERENTLY LOCAL CONCERN WHICH DOES NOT REQUIRE UNIFORM RULES OF DECISION

Great Lakes has characterized the relevant activity in this case as pile driving which, it argues, is a traditional maritime activity. *See* Opp. Cert. 12; Br. Great Lakes 23-25 (in 7th Cir.). The case law does not show, however, that there is a substantial federal maritime interest in providing a uniform rule of decision to govern tortious pile driving which causes damage to other structures; on the contrary, this type of claim has long been a concern of state law. Moreover, the general absence of federal maritime regulation governing pile driving is further evidence that there is no substantial federal interest in providing uniform rules to govern tortious pile driving activity. For these reasons, federal admiralty jurisdiction does not exist over the tortious activity at issue in this case.

A. The Case Law Demonstrates That Tortious Pile Driving Is A Concern Of State Law And Not Of Federal Admiralty Law

Throughout this litigation, Great Lakes has maintained that pile driving is a traditional maritime activity.[10] *See*

[10] The City of Chicago maintains that the relevant activity in this case is the manner in which the tunnel was maintained prior

Opp. Cert. 12; *see also* Br. Great Lakes 23-25 (in 7th Cir.). Great Lakes asserts the existence of "a century of cases applying admiralty jurisdiction to the installation and repair of pilings in navigable bodies of water," Opp. Cert. 12, and that, for "almost one hundred years," pile driving "has been considered a traditional maritime activity within [the] admiralty jurisdiction." Br. Great Lakes 23 (in 7th Cir.).

The cases Great Lakes cites, however, fall well short of satisfying its burden[11] of showing that the activity of tortious pile driving requires uniform rules of decision and the jurisdiction of a federal admiralty court to administer them. To the contrary, the most these cases can be said to stand for is that vessels which engage in pile driving also engage in other functions, such as navigation and the employment of seamen, which require uniform rules of decision and thus have been traditional concerns of the admiralty courts. And given the Court's recognition that the protection of the riverbanks from damage caused by vessels is an inherently local concern, *see Packet Co.*, 105 U.S. at 562-63, the protection of other structures from the harms caused by tortious pile driving should not be treated differently.

For example, Great Lakes asserts that *Lawrence v. The Flatboat*, 84 F. 200 (S.D. Ala. 1897), *aff'd sub nom. Southern Log Cart & Supply Co. v. Lawrence*, 86 F. 907 (5th Cir. 1898), was a "tort claim involving a pile driver

to the flood. *See* Br. Chicago at 48-49. *Amici* fully agree and submit that the operation and maintenance of tunnels is an inherently local concern which does not require uniform rules of decision. Consequently, there is no admiralty jurisdiction over the subject matter of this case. The discussion that follows demonstrates that even if the Court accepts Great Lakes' characterization of the relevant activity, it does not provide a basis for admiralty jurisdiction.

[11] As the party seeking to invoke the jurisdiction of the admiralty court, Great Lakes bears the burden of establishing its propriety. *See* Fed. R. Civ. P. 8(a).

on a flatboat." Opp. Cert. at 12 n.2. *Lawrence*, however, did not involve a tort claim but an action to recover back wages through the assertion of a maritime lien against the vessel. *See* 86 F. at 907. Such an action is within the admiralty jurisdiction because it is a maritime contract, not a tort.[12] *See Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 192 (1871); *Morewood v. Enequist*, 64 U.S. (23 How.) 491, 494 (1860); *Martinez v. Matson S.S. Co.*, 97 F.2d 19, 20 (5th Cir. 1938). *Lawrence* thus provides no authority for the proposition that negligent pile driving is within the admiralty jurisdiction as a maritime tort.[13]

Nor does *In re P. Sanford Ross*, 196 F. 921 (E.D.N.Y. 1912), *rev'd*, 204 F. 248 (2d Cir. 1913), support the extension of admiralty jurisdiction to the tortious conduct at issue here. There, the tortious activities at issue—negligence in the maneuvering of the vessel and in failing to provide necessary equipment, causing the death of a seaman, *see id.*—are the type of claims and activities (navigation and seaworthiness) which have traditionally required uniform rules of decision. The case therefore pro-

[12] As Professor Black described maritime contract jurisprudence, "[t]he attempt to project some 'principle' is best left alone. There is about as much 'principle' as there is in a list of irregular verbs." *Admiralty Jurisdiction*, 50 Colum. L. Rev. at 264. Certainly, an area of case law which has produced decisions "so humorous that they deserve insertion in the laws of Gerolstein," *see Sisson*, 497 U.S. at 372 (Scalia, J., concurring) (quoting Hough, *Admiralty Jurisdiction—Of Late Years*, 37 Harv. L. Rev. 529, 534 (1924)), provides no support for the notion that pile driving is a traditional maritime activity such as to confer maritime tort jurisdiction. That admiralty courts have heard maritime contract cases involving vessels engaged in pile driving simply shows that such vessels can engage in other functions which require uniform rules of decision.

[13] To similar effect is Great Lakes' reliance on *The V-14813*, 65 F.2d 789 (5th Cir. 1933). This case, which involved a suit to recover for labor and materials used to repair a tug and barge which carried a pile driver, was properly within the admiralty jurisdiction under the well settled rule that a contract to repair a vessel is maritime. *See* 1 *Benedict* at § 187.

vides no support for Great Lakes' contention that negligent pile driving is itself a maritime tort which must be adjudicated by an admiralty court.

Similarly unavailing is Great Lakes' reliance on *In re New York Dock Co.*, 61 F.2d 777 (2d Cir. 1932). There again, the underlying tort was not negligent pile driving but a personal injury to a seaman which was apparently caused by the failure to provide a seaworthy vessel. *See* 61 F.2d at 777. Such actions have long been the province of the admiralty courts. *See, e.g., The Osceola*, 189 U.S. 158, 175-77 (1903); 1 Martin J. Norris, *The Law of Maritime Personal Injuries* §2:6 (4th ed. 1990).[14]

In contrast to the absence of any tradition of admiralty courts exercising jurisdiction over disputes involving damage to other structures caused by tortious pile driving, state courts have long heard disputes of this kind. *See* 7 Stuart M. Speiser, *et al., The American Law Of Torts* § 19:16 (1990) (collecting state court cases); 4 Thomas G. Shearman & Amasa A. Redfield, *A Treatise On The Law of Negligence* § 758 (1941 & Supp. 1970) ("Substantial property damage sustained by a landowner as the actual result of the concussion and vibration from pile-driving operations upon adjacent land are recoverable even though such operations are reasonable and necessary and the pile driving is conducted in a careful and workmanlike manner."). The numerous state court cases ad-

[14] In the Seventh Circuit, Great Lakes also relied on several cases involving dredges and scows to support the exercise of admiralty jurisdiction in this case. Br. Great Lakes 24-25 (in 7th Cir.). These cases plainly do not establish the existence of admiralty jurisdiction over tortious pile driving.

Likewise, *Philadelphia, Wilm. & Balt. Ry. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1860), does not support Great Lakes because the claim there involved an "impediment to navigation," which "has always been considered as coming within the category of maritime torts, having their remedy in the courts of admiralty." *Id.* at 216 (citation omitted); *see also Foremost*, 457 U.S. at 674-76. Of course, none of the plaintiffs in this case assert any claims involving navigation.

judicating these claims demonstrate that pile driving is a common construction activity. *See, e.g., Vern J. Oja & Assoc. v. Washington Park Towers, Inc.*, 569 P.2d 1141, 1142 (Wash. 1977) (condominium apartment building); *D'Albora v. Tulane Univ.*, 274 So.2d 825, 827 (La. App. 1973) (hotel); *Lowry Hill Properties, Inc. v. Ashbach Const. Co.*, 194 N.W.2d 767, 769-70 (Minn. 1971) (highway interchange); *Caporale v. C.W. Blakeslee and Sons, Inc.*, 175 A.2d 561, 562 (Conn. 1961) (concrete retaining wall and bridge abutment). Given the numerous state court decisions adjudicating claims of damage to adjacent structures caused by tortious pile driving, Great Lakes' attempt to transform this common construction tort into a "traditional maritime" one is particularly unavailing.[16]

Moreover, tortious pile driving claims are simply not "a matter of global concern requiring uniformity under general maritime law." *American Dredging*, 114 S.Ct. at 990. Rather, the tortious activity at issue is far removed from the maritime law's traditional concern of protecting the shipping industry and traders—who, in the ordinary course of their affairs, travel throughout the world—by providing a legal system which assures that the same conduct will have similar legal consequences throughout the world. *Uniformity In The Maritime Law*, 73 Penn. L. Rev. at 127. There is no reason why the tortious conduct at issue here should be governed by the same rule of decision as would be applied by a court in Rotterdam or Shanghai.

[15] *See also* W.A. Dawson, *Pile Driving* 2 (1981) ("Piled lakeside dwellings are some of the earliest forms of construction. Most classical and medieval riverside towns were built on timber piles and many of our ancient cathedrals are still standing on them. Piling was a recognized military skill . . . ."); Federal Highway Administration, U.S. Department of Transportation, *The Performance Of Pile Driving Systems: Inspection Manual* 1 (1986) ("Pile driving systems are a rather archaic part of construction technology. They consist of a heavy mass which pounds on a 'stick' until it ends up buried in the ground.").

Indeed, the very nature of pile driving operations suggests that it is not properly the subject of a uniform federal rule. As a leading text notes, "[t]he effect on surrounding strata due to the driving of piles is rarely uniform." A.C. Dean, *Piles and Pile Driving* 119 (1935).[16] That the harms caused by the conduct of pile driving operations are likely to vary from one locale to another suggests that regulation of this activity is an inherently local concern. *Cf. Morgan's Steamship*, 118 U.S. at 465 ("The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York."). Just as the protection of the river banks at issue in *Packet Co.*, the protection of structures from the harms caused by tortious pile driving "belongs . . . manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing-places, can be properly made." 105 U.S. at 563. Under such circumstances, the States should be free to tailor appropriate standards of liability to reflect local conditions. *Id.*; *see also Morgan's Steamship*, 118 U.S. at 465.

Moreover, in the absence of any claims of injury by other maritime interests, the initiation of tortious pile driving from onboard a vessel does not, by itself, transform the activity from common construction to a "traditionally maritime" one which presumptively requires uniform rules of decision to govern it. As several leading texts on the subject demonstrate, the driving of pilings in the marine environment can frequently be accomplished by equipment which does not require the use of a vessel. *See, e.g., Piles and Pile Driving* at 126-29 (discussing construction of piers through use of screw piling machines

[16] *See also id.* at 2-3 (noting that without proper "[g]eological information as to surface deposits" a "pile cannot properly be designed, and there is no certainty . . . that the point of the pile is safely within a firm stratum").

and electric capstans); *cf. id.* at 15 (showing cutting of piles by equipment placed on staging); *Pile Driving* at 17-19 (discussing development of crane-leader piling rigs and their use in "driving piles for marine structures over water"). Even if the pilings involved here could have been driven only from a vessel, certainly a pile driver located on the land or a fixed (non-floating) platform could well have caused the same damage. The location of Great Lakes' pile driver aboard a scow does not justify extending the admiralty jurisdiction to the tortious conduct at issue here.[17] *Cf. Executive Jet*, 409 U.S. at 257-58 ("It is hard to think of any reason why access to federal court should be allowed . . . merely because of the fortuity that a tort occurred on navigable waters, rather than on other waters or on land.") (quoting ALI Study of the Division of Jurisdiction Between State and Federal Courts at 233); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424-25 (1985) (rejecting welder's claim that he was engaged in "maritime employment" under the LHWCA, noting that the activity "is also performed on land"). The power of the States to prescribe appropriate rules of decision tailored to local conditions should not be dis-

[17] As several photographs in the Joint Appendix demonstrate, Great Lakes used the same type of crane-leader piling rig which is commonly used in land based pile driving operations. *Compare* J.A. 64, 68, *with Pile Driving* at 17-18. Indeed, it appears that Great Lakes' crane was not permanently affixed to the scow and could readily be moved on and off of it. *See* J.A. 64, 76.

Amici also note the Affidavit of Wayne S. Valley, a twenty-year employee of Great Lakes. *See* J.A. 69-74. Mr. Valley's affidavit recounts the various construction projects engaged in by the scow No. G.L. 136 and its pile driving rig, which included the replacement of failed docks, the construction of new docks, the construction of a fountain, and the installation of sheet piling walls. *Id.* at 72-73. *Amici* respectfully submit that Great Lakes' position, if taken to its logical conclusion, would require the federal courts to exercise admiralty jurisdiction over tort claims arising out of the faulty construction of such projects. Surely there is no substantial federal interest in providing uniform rules of decision for such torts.

placed by federal admiralty law solely because the tortious conduct was initiated on a vessel.

B. Pile Driving Is Not The Subject Of Federal Maritime Regulation

The general absence of federal maritime regulation governing the subject matter of pile driving is further evidence that there is no substantial federal maritime interest in providing uniform rules to govern tortious pile driving activity. The tort at issue here thus stands in stark contrast to the vessel collision in *Foremost*, which was governed by a federal statutory enactment that required uniform administration by the federal admiralty courts. *See* 457 U.S. at 676 (citing the Rules of the Road, 33 U.S.C. §§ 2001 *et seq.*).

As an initial matter, *amici* note that while Congress has instructed the Coast Guard to examine and license such varied categories of maritime personnel as masters, pilots, mates, operators, engineers, radio officers, able seamen, lifeboatmen and tankermen, *see* 46 U.S.C. §§ 7101(c), 7301 *et seq.*, it has prescribed no licensing requirement for pile driver operators. Nor does the Coast Guard examine in pile driving operations any category of the personnel it licenses or documents. *See* 46 C.F.R. § 10.910 (table listing examination topics for deck licenses); *id.* § 12.05-9 (examination of able seaman); *id.* § 12.20-5 (examination of tankerman). Moreover, while Congress has enacted an extensive body of statutory law pertaining to navigation and the navigable waters as well as shipping, *amici* are aware of no provision of these statutes which prescribes standards for the operation of pile driving as a distinct activity.[18] *See generally* Title 33 U.S.C., Title 46 U.S.C.

[18] Vessels engaged in pile driving are, of course, subject to a variety of statutes of general applicability such as the Refuse Act of 1899, 33 U.S.C. § 407, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, and the Rules of the Road, 33 U.S.C. §§ 2001 *et seq.* *Amici* also note that the Occupational Safety and Health Administration has promulgated "safety and health regulations for construction" activities, *see* 29 C.F.R. Pt. 1926, which include regulations pertaining to the safety of workers engaged in the operation of pile driving equipment. *See* 29 C.F.R. 1926.603. To the best of *amici*'s knowledge, neither Congress, nor any federal agency, has prescribed standards pertinent to the tortious conduct at issue in this case.

Amici also note that under federal law, vessels such as the G.L. 136, the barge on which the pile driver was located, *see* Pet. App. 28, are not required to be inspected. *See* 46 U.S.C. § 3301 (listing vessels subject to Coast Guard inspection).

The absence of any substantial federal maritime interest in regulating pile driving operations refutes Great Lakes' contention that admiralty jurisdiction exists over the tort at issue here. The exercise of state court jurisdiction cannot pose a threat to the federal interest in the uniform development of admiralty law when there is no evidence of a substantial federal maritime interest in regulating the activity. Under these circumstances, there is no valid reason for the admiralty jurisdiction to displace state forums and rules of decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 22, 1994

Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE RESPONDENT, GREAT LAKES DREDGE & DOCK COMPANY

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QUESTIONS PRESENTED

1. Whether the flooding of land structures caused by a vessel's activities on navigable waters is within the admiralty and maritime jurisdiction of the district court pursuant to 28 U.S.C. § 1333 and Article III, Sec. 2, of the Constitution.

2. Whether the flooding of land structures caused by a moored vessel's activities on navigable waters, which also resulted in the closing of those navigable waters to all commerce, satisfies the test for admiralty jurisdiction set forth in *Sisson v. Ruby*, 497 U.S. 358 (1990).

3. Whether the Admiralty Extension Act, 46 U.S.C. § 740, provides a separate basis of admiralty jurisdiction.

4. Whether the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*, provides a basis of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. § 1333.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION

STATUTES

Nos. 93-762 and 93-1094

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE RESPONDENT, GREAT LAKES DREDGE & DOCK COMPANY

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Respondent, Great Lakes Dredge & Dock Company ("Respondent"). Both Petitioners and Respondent have consented to the MLA's participation, and copies of the consent forms will be filed concurrently herewith.

NATURE OF MLA'S INTEREST

MLA has a strong interest in this case because it involves important issues of maritime law, and because the Court's decision may substantially affect the uniformity of maritime law. MLA is a nationwide bar association founded in 1899 and incorporated in 1993. Its membership of approximately 3,600 includes attorneys, judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association ("ABA") and is represented in ABA's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers and all other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*. . . .

(Emphasis added).

The MLA has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act and the Federal Arbitration Act. 46 U.S.C. §§ 1300-1315; 9 U.S.C. §§ 1-16. The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[1]

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[1] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376 (1988); implementation of the 1972 Convention for (continued...)

On April 25, 1975, the MLA passed a resolution urging congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well."[2] A substantially identical resolution was adopted by the American Bar Association in 1976. The MLA reaffirmed this resolution in 1986.[3]

In furtherance of its uniformity of maritime law policy, MLA has filed a number of *amicus* briefs accepted by this Court[4] in important issues of maritime law where the Court's decision would substantially affect the uniformity of maritime law. Such a situation exists in this case.

The maritime jurisdiction of federal courts is provided by the Constitution and is the cornerstone upon which uniformity of U.S. maritime law has been built. If maritime interests were governed by the laws of the fifty states, it would create an unworkable patchwork of laws that would defeat uniformity and inhibit the free flow and use of navigable waters.

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[1] (...continued)
Preventing Collisions at Sea, 28 U.S.T. 3459, 1050 U.N.T.S. 16, *amended* by T.I.A.S. No. 10672, 1143 U.N.T.S. 346, *reprinted* in 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993) [BENEDICT] at p. 3-34.1, *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073 (1988).

[2] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[3] MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

[4] *E.g.*, *Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

SUMMARY OF ARGUMENT

This case involves the flooding of shore structures caused by a vessel on a navigable waterway which breached the river bed, closing that waterway to all commerce. Such an occurrence is within the admiralty and maritime jurisdiction because (1) it occurred on navigable waters and (2) it involved a vessel. The MLA urges this Court to adopt this modified "situs" test for admiralty tort jurisdiction. Such a test will assist in providing a uniform set of laws for the use of navigable waters by vessels, a primary purpose of constitutional grant of admiralty jurisdiction. It is imperative to adopt this modified "situs" test because the lower courts have been unable to apply the nexus requirements of this Court's decisions in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) and *Sisson v. Ruby*, 497 U.S. 358 (1990) in uniform a manner.

Admiralty jurisdiction also exists, even if the nexus test as most recently explained in *Sisson* is applied to the facts of this case. The Seventh Circuit correctly decided that the flooding of land structures caused by a moored vessel's activities on navigable waters, which also resulted in the closing of those navigable waters to all commerce, satisfied the two-part analysis under *Sisson*. Admiralty jurisdiction is also supplied by the Admiralty Extension Act, which extends jurisdiction to all cases of injury or damage caused by a vessel on navigable water, even if such damage is consummated on land. Further, jurisdiction exists under the Limitation of Liability Act, which allows a vessel owner to seek limitation or exoneration from liability in relation to liabilities both maritime and non-maritime.

ARGUMENT

I.

TORTS ARISING ON OR CAUSED BY VESSELS ON NAVIGABLE WATERS ARE WITHIN THE ADMIRALTY JURISDICTION.

A. Introduction.

For the fourth time in twenty-two years, and for the third time in twelve years, this Court has found it necessary to take a case so that it may clarify and define the boundaries of admiralty tort jurisdiction.[5] Jurisdictional confusion has existed since this Court adopted a "nexus" test with respect to admiralty tort jurisdiction in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). The jurisdictional confusion engendered by the nexus test may only be ended by recognizing that the test should be limited to cases not involving vessels. In other words, admiralty tort jurisdiction should exist in all cases where (1) the tort occurs on navigable waters *and* (2) the tort occurs on or is caused by a vessel.[6] No further inquiry should be necessary. Only where a vessel is not so involved should the courts employ the "nexus" test. By adopting this approach, the Court would add certainty and uniformity to the jurisdictional inquiry over which the lower courts clear-

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[5] *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990) and now this case.

[6] This is essentially the same test that counsel for *Amicus* MLA argued when they represented petitioner Everett Sisson before this Court four years ago. The rationale advanced at that time was that this test provides a clear and precise set of criteria for determining jurisdiction and eliminates the uncertainty manifested in the decisions of the lower courts. The aftermath of *Sisson* has only confirmed the correctness of that rationale and the continued need for a simplified test.

ly remain confused. At the same time, this approach would properly address the traditional concerns of the maritime law.

B. The Constitutional Grant Of Admiralty And Maritime Jurisdiction To The Federal Courts Should Be Broadly Construed.

Article III, Section 2 of the U.S. Constitution grants U.S. judicial power to "all cases of admiralty and maritime jurisdiction." According to this Court, the Constitution establishes three different grants of power:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within Constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the Constitution.

Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61 (1959).

Since the early days of this nation, the constitutional grant of admiralty and maritime jurisdiction to the federal courts has been broadly construed. Justice Story noted that the addition of the term "maritime" in the constitutional grant of power was purposeful, and that jurisdiction was broader than just the term "admiralty" as it existed under English law and called for the most liberal interpretation:

> [T]he Constitution not only confers admiralty jurisdiction, but the word "maritime" is super added, seemingly ex industria to remove every latent doubt. "Cases of maritime jurisdiction" must include all

> maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, "causae civiles et maritime." In this view there is a peculiar propriety in the incorporation of the term "maritime" into the Constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. [Citation omitted]. One party sought to limit it by locality, another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases.
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> . . . [T]he language of the Constitution will therefore warrant the most liberal interpretation. . . .
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> The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorized us to believe the national policy, as well as juridical logic, require the clause of the Constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.

Delevio v. Boit, 7 F. Cas. 418, 442-43 (C.C.D. Mass. 1815).

There has been no development since Justice Story wrote these words which warrants a restriction of the Court's admiralty and maritime jurisdiction. For more than 150 years, the federal courts applied a broad locality test to determine whether a tort action fell within the admiralty jurisdiction. Under this "locality" or "situs" test, admiralty jurisdiction existed where an injury occurred on navigable waters. *Thomas v. Lane*, 23 F. Cas. 957, 960 (C.C.D. Ma. 1813). The situs test was later expanded to include all navigable waters, encompassing the U.S. inland waterway system of lakes and rivers. *The Propeller Genesee Chief v.*

Fitzhugh, 53 U.S. (12 How.) 443 (1852). Further, this Court clarified that both the wrong and the injury must have been "wholly committed" upon navigable waters for jurisdiction to exist. *The Plymouth*, 70 U.S. (3 Wall.) 20 (1856). The Court later reiterated this principle by holding that damage to a bridge caused by a vessel was damage to a shore structure, and was not within the "locality" rule. *Martin v. West*, 222 U.S. 191 (1911). Congress subsequently exercised its constitutional power to statutorily define admiralty and maritime jurisdiction by overruling a strict locality test through the Admiralty Extension Act, 46 U.S.C. § 740. *See Executive Jet*, 409 U.S. at 260.

C. The Recommended Test For Admiralty Jurisdiction Is A Modified Situs Test.

There were no major difficulties in applying the situs test until *Executive Jet*, a case involving an aviation accident on domestic navigable waters. This Court held that in an aviation case, the wrong must "bear a significant relationship to traditional maritime activity." *Executive Jet*, 409 U.S. at 268. (The "nexus test"). This Court did not rule in *Executive Jet* that the locality rule had been abandoned with respect to vessels. In fact, *Executive Jet* "could be understood as resting on the quite simple ground that the tort did not involve a vessel, which had traditionally been thought required by the leading scholars in the field . . . [a]t the very least, the opinion conveyed the strong implication that a case involving a tort occurring 'in connection with a waterborne vessel' . . . would be deemed within the admiralty jurisdiction without further inquiry." *Sisson*, (Justice Scalia, concurring), 497 U.S. at 369-70 (citations omitted).

Following *Executive Jet*, federal courts developed various tests for determining the requisite "nexus", even

where there had been no need before.[7] In *Foremost* and *Sisson*, this Court attempted to respond to the confusion evident in the lower courts' application of the *Executive Jet* nexus test to situations outside the factual context of *Executive Jet*. But truly, there was no need to apply a nexus test in either case, as both involved vessels. Indeed, the result of *Sisson* only confirms that the Court has, for all practical purposes, *already* adopted the modified "situs" test the MLA proposes: *Sisson* involved a fire on a pleasure vessel docked in a marina on Lake Michigan. *The vessel was doing nothing*. If the injury in *Sisson* is within the admiralty jurisdiction where the vessel was just docked, then any wrong occurring on or caused by a vessel on navigable waters should be considered within such jurisdiction, especially if the vessel is doing *something*, as it was in this case, i.e. moored and driving pilings.

Thus, by establishing admiralty jurisdiction over torts which (1) occur on navigable waters *and* (2) which occur on or are caused by a vessel, this Court would recognize explicitly, as *Sisson* does implicitly, that everything a vessel does in navigable waters is related to traditional maritime activity. This modified "situs" test is straightforward and accurately encompasses the jurisdictional interests of the admiralty and maritime law. This test is facilitated by the fact that a statutory definition of "vessel" already exists. Congress has consistently defined "vessel" to include all

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[7] Many followed some variation of the test developed in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). The *Kelly* court decided that a four-factor test should be applied: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. As the number of factors rose, so did the number of cases with varying results, some unduly limiting maritime jurisdiction to cases directly involving maritime commerce.

manner of craft, including barges, tugs, freighters, ferry boats, excursion boats and fishing boats "used or capable of being used as a means of transportation on water."[8] With the proposed test, the courts could dispense with the *ad hoc*, case-by-case analyses which have so muddied the jurisdictional waters and threatened the uniformity of maritime law. Further, the test is flexible enough to respond to maritime technology changes, and it would lead to uniformity in law applicable to vessel casualties on navigable water.

D. The Lower Courts Remain Confused After *Sisson*.

The need for the modified "situs" test is demonstrated by the confusion which has increased after the *Sisson* decision. Despite this Court's clear intent to end the multi-factored jurisdictional tests which flourished after *Executive Jet* and *Foremost*, the lower courts have continued to apply the same tests they employed prior to *Sisson*, reverting back to the jurisdictional analysis set forth in *Kelly v. Smith*, 458 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), or variations thereof.

For instance, the Third Circuit and Fourth Circuit, while acknowledging they were bound by *Sisson*, continue to use the *Kelly* factors. *Sinclair v. Soniforn, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131 (4th Cir. 1991). Many courts have interpreted *Sisson* as neither approving nor disapproving of the *Kelly* analysis, and therefore continue to apply *Kelly* in determining the existence of admiralty jurisdiction. *Broughton Offshore Drilling v. South Cent. Mach., Inc.*, 911 F.2d 1050 (5th Cir. 1990); *Dean v. Maritime Overseas Corp.*, 770 F. Supp. 309 (E.D. La. 1991),

[8] 1 U.S.C. § 3.

aff'd, 981 F.2d 1256 (5th Cir. 1992); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1303 (1994), *reh'g granted*, No. 93-1209, 1994 WL 157065 (5th Cir. April 24, 1994); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309 (E.D. Va. 1993); *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103 (E.D. La. 1993); *Palmer v. Fayard Moving & Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991); *Fox v. Southern Scrap Export Co.*, 618 So. 2d 844 (La. 1993). Still other courts have applied a modified version of the *Kelly* analysis noting that only the "causation" factor of the inquiry has been precluded by *Sisson*. *See Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312 (9th Cir. 1993).

Some courts have combined the *Kelly* and *Sisson* inquiries to determine whether admiralty jurisdiction exists. *See Antoine v. Zapata Haynie Corp.*, 777 F. Supp. 1360 (E.D. Tex. 1991); *Ozzello v. Peterson Builders, Inc.*, 743 F. Supp. 1302 (E.D. Wis. 1990). Citing *Sisson* as only a secondary source, the court in *Torres v. City of New York*, 581 N.Y.S.2d 194 (N.Y. App. Div. 1992), *cert. denied*, 113 S. Ct. 1584 (1993), declined to use the two-part "expanded" nexus test of *Sisson* in determining admiralty jurisdiction.

Aside from the Seventh Circuit, only a few courts have actually relied on *Sisson* or have cited *Sisson* as their authority in determining the existence of admiralty jurisdiction.[9] However, even while attempting to adhere to the guidelines of *Sisson*, some courts clearly disagree as to the proper

[9] *See, e.g., Royal Insurance Co. v. Marina Industries*, 611 S.E.2d 416 (Mass. App. Ct. 1993); *General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916 (Tex. 1993), *cert. dismissed*, 114 S. Ct. 490 (1993); *Mizenko v. Electric Motor & Contracting Co.*, 419 S.E.2d 637 (Va. 1992); *Bergeron v. Blake Drilling & Workover Co.*, 599 So. 2d 827 (La. App. 1992).

interpretation to be placed on the various parts of the inquiry, particularly with respect to the characterization of the relevant activity.[10]

While the Seventh Circuit was able to apply *Sisson* correctly and reach the correct result, most other courts have either misinterpreted, misapplied or ignored the decision. The confusion found in this post-*Sisson* history will undoubtedly continue unless this Court adopts a modified "situs" test and reserves the *Sisson* "nexus" test for the truly unusual cases which do not involve vessels. Indeed, since the primary interest of the admiralty jurisdiction is to protect the use of navigable waters by vessels, it is suggested that only the first prong of the *Sisson* test (i.e., whether the incident posed a potential hazard to maritime commerce) is needed. It is the second prong of *Sisson*—defining the relevant "activity" and its relationship to traditional maritime activity—which has created the greatest confusion for the lower courts.

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[10] *See In re Bird*, 793 F. Supp. 575 (D.S.C. 1992); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993) (court divided over the characterization of the "relevant activity" under *Sisson* analysis and abandons *Sisson* for *Kelly* approach); *Stanton v. Bayliner Marine Corp.*, 844 P.2d 1019 (Wash. Ct. App. 1992), *rev'd*, 866 P.2d 15 (Wash. 1993); *Penton v. Ponpano Constr. Co.*, 976 F.2d 636 (11th Cir. 1992); *Woltering v. Outboard Marine Corp.*, 615 N.E.2d 86 (Ill. App. Ct. 1993), appeal denied, 622 N.E.2d 1229 (Ill. 1993), *petition for cert. filed*, 62 U.S.L.W. 3493 (1994).

II.

ADMIRALTY JURISDICTION IN TORT EXISTS IN THIS CASE UNDER THE *SISSON* TEST.

A. The Seventh Circuit Correctly Applied *Sisson*.

Should this Court decline to adopt a modified "situs" test, it should nonetheless affirm the Seventh Circuit's decision as a faithful application of the test for admiralty jurisdiction set forth in *Sisson v. Ruby*, 497 U.S. 358 (1990).

In *Sisson*, this Court formulated a "nexus" test consisting of two inquiries: (1) whether the incident posed a potential hazard to maritime commerce and (2) whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity. *Id.* at 362-365. With respect to the first inquiry, this Court determined the potential impact of the incident by examining its *general* features or character, rather than focusing on the particular facts of the incident. In *Sisson*, the general features of the incident were a fire on a vessel docked at a marina in navigable waters, which "plainly" satisfied the potential hazard requirement given that the fire might spread to nearby commercial vessels or prevent such vessels from using the marina. *Id.* at 362-63.

Regarding the second inquiry, this Court stressed that it is not necessary for lower courts to ascertain the precise cause of the harm. Rather, in defining the relevant activity, the focus should be on the general conduct from which the incident arose. *Id.* at 364-65. In *Sisson*, the general activity was the storage and maintenance of a vessel at a marina on navigable waters; the fact that the fire originated in a clothes dryer was immaterial. The Court held this activity was substantially related to traditional maritime activity because "docking a vessel at a marina on a navigable waterway is a common, if not indispensable, maritime activity." *Id.* at 367. If the activity of a pleasure boat docked for

maintenance and storage at a recreational marina is a traditional maritime activity, it is indeed difficult to conceive of any activity of any vessel which would not qualify under the *Sisson* test. This Court clearly intended a *broad* and *liberal* interpretation of the *Executive Jet* and *Foremost* "nexus" principles.

In this case, the Seventh Circuit was faithful to the Court's clear purpose in *Sisson*. The underlying "situs" requirement was satisfied because the incident occurred on the Chicago River, a long-established navigable waterway. *Escanaba Co. v. City of Chicago*, 107 U.S. 678 (1883). For the first part of the "nexus" inquiry, the court focused on the general character of the incident: pile driving from moored barges in a navigable waterway which ultimately caused the collapse of a submerged tunnel and flooding of the nearby business district. *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 230 (7th Cir. 1993).[11] Here, there was no question that the incident engendered by such pile driving in fact disrupted all commerce on the Chicago River for more than a month. *Id.* 3 F.3d at 226, 228. For the second part of the "nexus" test, the Seventh Circuit examined the general conduct or activity from which the incident arose, which it found to be "the sinking of

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[11] The City and Grubart argue that the Seventh Circuit erred because it essentially viewed the "incident" as being the same as the "activity." But petitioners are engaging in semantics. The Seventh Circuit recognized in analyzing this question that the *activity* of driving piles in a navigable waterway caused the perforation of the tunnel and the consequent flood which in fact closed the waterway to all vessel traffic. At the end of its analysis of this question, the Seventh Circuit states "Here we need not engage in any such inquiry [i.e., was the incident likely to disrupt commercial activity], since we know to an absolute certainty that Great Lakes' *activity, and the incident it engendered,* had the potential to disrupt maritime commerce." *Great Lakes Dredge & Dock Co.*, 3 F.3d at 230 n.7 (emphasis added).

pilings into a river bed." Because such pilings serve, in part, to protect ships from collisions with bridges and aid navigation, their installation relates to maritime activity. *Id.* at 230.

Jurisdiction exists and the Seventh Circuit should be affirmed. The "incident" here is a commercial vessel's perforation of a submerged tunnel structure,[12] which drained substantial water from a navigable river, flooded the tunnel, communicated damage to nearby shore structures and disrupted maritime commerce by closing a navigable waterway to all maritime traffic. There is also a substantial relationship between the activity giving rise to the incident and traditional maritime activity. Petitioners argue that pile driving is really a land based activity and urge the Court to focus on this as an important factor.[13] Although the Seventh Circuit does describe pile driving as the "activity", *Sisson* dictates an even more general description:

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[12] Other courts have recognized that claims arising from vessels which cause damage to submerged structures are within the admiralty jurisdiction, and have even allowed limitation of liability in such cases. *See Marathon Pipe Line Co. v. Drilling Rig ROWAN/ODESSA*, 761 F.2d 229 (5th Cir. 1985) (general maritime law applied to collision between the leg (spud) of towed drilling rig and a pipeline on the seabed); *Signal Oil & Gas Co. v. Barge W-701*, 654 F. 2d 1164 (5th Cir. 1981), *cert. denied*, 455 U.S. 944 (1982) (barge engaged in pipeline construction on ocean floor permitted to limit liability for damages caused when anchor fouled on pipeline). Applying the principles of those cases, surely there would have been no dispute as to admiralty jurisdiction in this case if a vessel dragging its anchor in the river damaged an electrical cable, cutting off power to the city, or if the anchor perforated the tunnel.

[13] In any event, it is *immaterial* that pile driving is not uniquely maritime. Vessels engage in numerous activities which are not uniquely maritime: carriage of goods (vessel or truck), carriage of passengers (vessel or train), dredging (earthmoving), laying cable, fishing, docking (parking), *drying* clothes, etc.

the general character of the "activity" was the anchoring or mooring of a vessel to perform work in a navigational channel (in *Sisson*, the activity was the mooring of a yacht). It is immaterial that the cause of the incident was pile driving, just as it was immaterial in *Sisson* that the fire was caused by a clothes dryer, arguably a "land" based instrumentality. The broad principles of *Sisson* are satisfied. Maritime jurisdiction exists.

B. It Is Immaterial To The Jurisdictional Inquiry That One Of The Parties Is Not Engaged In Traditional Maritime Activities.

The petitioners essentially urge this Court to adopt a "totality of the circumstances" test for admiralty tort jurisdiction to determine whether there is a sufficient "federal" interest, claiming that *Sisson* is inapplicable to this case. The crux of their argument is that *Sisson* left open for future decision a case where one of the "instrumentalities" in a case is involved in a traditional maritime activity, but the other is not, citing *Sisson*, 497 U.S. at 358 n.3. Based on this footnote, they claim it was wrong for the Seventh Circuit to focus solely on the activities of Great Lakes and ask the Court to adopt a new test.

Petitioners have read far too much into footnote 3 of *Sisson*. The Court merely stated that different issues "*may*" be raised where not all of the parties or instrumentalities are engaged in a traditional maritime activity. In its own analysis in *Sisson*, the Court focused solely on the activities of Sisson's boat. The result in *Sisson* would not have been different if the fire had spread to a shore structure *not* connected with any traditional maritime activities. The fact that one of the parties or "instrumentalities" may not be involved in a traditional maritime activity is truly irrelevant to the jurisdictional inquiry. The *Sisson* test suffices.

For instance, consider the possibility of a commercial vessel colliding with the channel wall of the Chicago River, exploding and killing patrons of a restaurant happily eating lunch in a riverside cafe. Suppose a vessel collides with the levee on the Mississippi River in St. Louis, through which river water spills and floods land-based structures. In both examples, the injured parties are not engaged in traditional maritime activities, but both are clearly within maritime jurisdiction.

The most likely source of a party not involved in traditional maritime activities *is the land*. The obvious answer to this supposed dilemma is already available through the Admiralty Extension Act, 46 U.S.C. § 740. There is no need for a *separate* test for such potential plaintiffs. The Seventh Circuit was correct in holding that any jurisdictional difficulty with the fact that damage was communicated from ship to shore is solved by the Extension Act.

C. Federal Maritime Interests Are Involved In This Case.

Petitioners also argue that no "federal" interests are at stake in this case. However, the fact that this matter arose from commercial activity on a navigable waterway of the United States used for interstate commerce is certainly interest enough.[14] Such waters are regulated by the U.S. Coast Guard and the U.S. Army Corps of Engineers. Bridges themselves are impediments to navigation and their construction and maintenance, and construction of

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[14] Indeed, the amount of water drained into the Chicago River from Lake Michigan has been recognized as a federal interest affecting navigable waters and is subject to a continuing injunction from this Court. *State of Wisconsin v. State of Illinois*, 449 U.S. 48 (1980); *former decisions* (inter alia), 388 U.S. 426 (1967); 281 U.S. 696 (1930); 278 U.S. 367 (1929); 266 U.S. 405 (1925).

pilings, are the subject of federal statutes and regulations. 33 U.S.C. § 491, *et seq.*; 33 U.S.C. § 511, *et seq.*; 33 C.F.R. Part I, Subchapter J. The Chicago River itself is subject to specific federal regulations governing the operation of its numerous drawbridges. 33 C.F.R. § 117.391. Moreover, the City appeared before this Court in *West Chicago St. Railroad Co. v. People of the State of Illinois Ex. Rel. City of Chicago*, 201 U.S. 506 (1906) and argued that the railroad company which built the tunnels under the Chicago River should be compelled to lower those tunnels because Congress had passed legislation finding them to be an obstruction to navigation (the City now owns the tunnels). This Court agreed that the federal interest in unobstructed navigable waters extended to the soil underneath the bed of those waters, stating that the rights of the railroad "as owner of the fee of land on either side of the river or in its bed were subject to the paramount right of navigation over the waters of the river." 201 U.S. at 524. The City cannot be heard to argue that an incident arising from the maintenance of a navigable channel around a bridge which damages a submerged tunnel, both of which are obstructions to navigation, impacts no federal maritime interests, especially where the City took that position itself in legislation and now even owns the tunnels.[15]

It is immaterial to this case that numerous land-based persons are victims of an event arising from activities soundly within this federal maritime arena. Any number of situations can be imagined where an incident arising from

[15] The tunnel system has an additional connection to navigation upon the Chicago River: a major source of traffic for the tunnel system was the removal of excavation materials from city construction sites which were dumped into barges at river terminals connected to the system. Bruce Moffat, *Forty Feet Below: The Story of Chicago's Freight Tunnels* (1st ed. 1982).

the activities of a vessel on navigable waters has disastrous effects on land-based parties.[16] It even can be said that the federal interest is stronger in situations where a federally regulated activity causes a disaster.

D. Maritime Jurisdiction Provides A Fair Forum And Fair Remedies.

Petitioners also raise quasi-due process arguments by claiming it is unfair to require the City and the other Claimants to have their claims decided in federal court under the maritime law. They argue they had no notice they might be subject to such law and jurisdiction and that their rights and remedies are dramatically restricted. The City is certainly on notice that actions it takes with respect to its numerous bridges over the Chicago River are potentially subject to litigation in a federal maritime court.[17] But

[16] *See, e.g., In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952), *aff'd sub nom., Dalehite v. United States*, 346 U.S. 15 (1953) (explosion of fertilizer aboard cargo ship resulted in 988 personal injury and death claims and 5,987 property damage claims from persons in and around Texas City, Texas). Related case: *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961), *cert. denied*, 396 U.S. 804 (1962) (vessel owner's petition for Limitation of Liability for disaster, vessel owner held not liable).

[17] The City's contention that it did not have fair notice that it might be "haled" into federal court under admiralty jurisdiction is belied by the fact that the City has been litigating cases involving its bridges over the Chicago River in the federal courts under admiralty jurisdiction for more than one hundred years. *See, e.g., N.M. Paterson & Sons Ltd. v. City of Chicago*, 324 F.2d 254 (7th Cir. 1963) (admiralty action arising out of collision between steamship and bridge over Chicago River); *Eastern S.S. Corp. v. City of Chicago*, 47 F.2d 1017 (7th Cir. 1931) (steamship collision with Harrison Street bridge on Chicago River); *City of Chicago v. Chicago Transp. Co.*, 222 F. 238 (7th Cir. 1915)

(continued...)

as already noted, the City itself has brought maritime litigation with respect to the tunnel system because that system is an obstruction to navigation. *West Chicago*, 201 U.S. 506. The City chose to enter this federal arena by constructing bridges over the Chicago River which restrict the width of the channel and the free movement of masted and unmasted river traffic.[18] It should not be a surprise to the residents of downtown Chicago, which is essentially an island accessible only by bridges (see maps at Appendix A), that the river might flood the downtown district due to a maritime accident.

The Claimants aside from the City are also in a potentially better position under the maritime law. As Grubart

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[17] (...continued)
(schooner collision with bridge over Chicago River); *City of Chicago v. Michigan I. & I. Line*, 201 F. 89 (7th Cir. 1912) (collision of steamer with Lake Street bridge over Chicago River); *Munroe v. City of Chicago*, 194 F. 936 (7th Cir. 1912) (steamer collision with Taylor bridge over Chicago River); *City of Chicago v. Mullen*, 116 F. 292 (7th Cir. 1902) (schooner collision with Kinzie Street bridge over the Chicago River); *See also Thompson Navigation v. City of Chicago*, 79 Fed. 984 (N.D. Ill. 1897) (admiralty suit arising out of collision between city fire tug and another vessel in Chicago River).

[18] The City of Chicago owns, operates and maintains more movable bridges than any other public agency in the world. As the City itself has boasted:

> It is safe to say that the City of Chicago owes its very existence to the great natural waterway connection between the Great Lakes and the Mississippi River basin—The Checaugou Portage. It is also true that Chicago could not have attained its present magnitude as one of the great cities of the world without the great trunnion bascule bridges developed by successive generations of devoted and determined engineers and builders.

City of Chicago, Richard J. Daley, Mayor, *The Movable Bridges of Chicago* (1970).

itself points out, the City lacks immunity under substantive maritime law. *City of Chicago v. White Transportation*, 243 F. 358 (7th Cir. 1917). Further, the maritime law provides for prejudgment interest in nearly all cases. *Hillier v. Southern Towing Co.*, 740 F.2d 583 (7th Cir. 1984). Should the district court decide that Great Lakes is not entitled to limitation of liability, it has the option of remanding the case to the state court, where the Claimants may pursue their actions under the Savings to Suitors Clause, 28 U.S.C. § 1333(1), allowing all state law remedies and a jury trial, subject to the substantive maritime law. 3 *Benedict on Admiralty*, §§ 12, 51 (7th ed. 1993). In sum, the Petitioners' equitable or due process arguments are misplaced.

III.

THE ADMIRALTY EXTENSION ACT CONFERS JURISDICTION IN THIS CASE.

The Admiralty Extension Act, 46 U.S.C. § 740, enacted in 1948, extended admiralty jurisdiction to all cases of damage or injury caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land."[19] The underlying purpose of the Act is to broaden the right of a claimant to sue in admiralty. Prior to the enactment of the Admiralty Extension Act, admiralty tort jurisdiction was limited by the "locality" or "situs" rule. *See The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Martin v.*

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[19] The Admiralty Extension Act, 46 U.S.C. § 740 provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a *vessel* on *navigable water*, notwithstanding that such damage or injury be done or consummated on land.

(Emphasis added).

West, 222 U.S. 191 (1911) (damage to bridge caused by vessel not in admiralty). Congress enacted the Admiralty Extension Act to extend admiralty jurisdiction to all cases where the injury caused by a vessel occurred or was consummated on land, essentially overruling the holding of *The Plymouth* and *Martin v. West*. *See Executive Jet*, 409 U.S. at 260. The Act is jurisdictional because it provides jurisdiction where none before existed. No other jurisdictional test is, therefore, needed as a predicate.

The Act was not intended, however, to apply only to the "ship-to-shore" collisions or other situations where the action of the vessel itself leads to the injury. *See J.W. Petersen Coal & Oil Co. v. United States*, 323 F. Supp. 1198 (N.D. Ill. 1970). Nothing in the legislative history of the Act limits its application to injuries actually caused by the physical agency of the vessel or a particular part of it. In *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209-10 (1963), this Court stated:

> There is no distinction in admiralty between torts committed by the ship itself and by the ship's personnel who are operating it, anymore than there is between torts committed by a corporation and by its employees. And ships are libeled as readily for an unduly bellicose mate's assault on a crewman . . . . or for having an incompetent crew or master . . . . as for collision.

(Citation omitted).

The only limitation placed on the application of the Act is that the land-based injury must be caused by a vessel on navigable water, a requirement identical to that argued here in Section I as the proper test. *See Boudloche v. Conoco Oil Corp.*, 615 F.2d 687 (5th Cir. 1980). Thus, the Act applies to confer admiralty jurisdiction in a wide range of situations, including when injury is caused by an allision

between a ship and a bridge;[20] the overflow of heating oil in harbor waters;[21] pollution damage;[22] and damage to an underwater gas main or pipeline.[23] The Act also extends to those cases where there is no actual physical impact by a vessel, but where the damage is proximately caused by the vessel or its master or crew, including when injury is caused to automobiles on a dock resulting from emissions from tied-up vessels;[24] shore damage due to the discharge of pollution from a vessel;[25] and economic loss incurred by a restaurant resulting from a ship's collision with a ferry.[26] *See also Loeber v. Bay Tankers, Inc.*, 924 F.2d 1340 (5th Cir.), *cert. denied*, 112 S. Ct. 78 (1991) (admiralty jurisdiction when a passing merchant vessel caused dock to surge and dislodge a ladder, injuring a person on the dock).

The party allegedly causing the land-based injury also has the right to bring an action under the court's admiralty

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[20] *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204 (5th Cir.), *cert. denied*, 393 U.S. 983 (1968).

[21] *In re New Jersey Barging & Corp.*, 168 F. Supp. 925, (S.D.N.Y 1958).

[22] *Louisiana ex rel Guste v. M/V Testbank*, 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

[23] *Southern Natural Gas Co. v. Gulf Oil Corp.*, 320 So.2d 917 (La. Ct. App. 1975), *appeal denied*, 324 So.2d 812 (La. 1976); *Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co.*, 455 F.2d 957 (5th Cir. 1972).

[24] *Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co.*, 544 F. Supp. 1104, (D. Md. 1982), *aff'd without opinion*, 742 F.2d 1449 (4th Cir. 1984).

[25] *Parcel v. City Lumber Co.*, 1977 AMC 1704 (D. Conn. 1976).

[26] *Lynchburg Crossing, Inc. v. M/V City of Port of Allen*, 1982 AMC 2072 (Tex. App. 1980) (although admiralty jurisdiction existed, the case was dismissed on the ground that economic loss was not recoverable in admiralty.)

jurisdiction. The Act is not restricted in its application to use by the injured plaintiff. Nor is the Act limited with respect to the time or place of the injury. As noted earlier in this brief, there certainly can be imagined maritime accidents of tremendous force or sweeping effect that extend far inland, reaching numerous land-based parties. *See, e.g., In re Texas City Disaster Litigation, supra*, n. 16. The fact that such accidents may affect parties a significant distance from shore should not defeat application of the Extension Act.

IV.

THE LIMITATION OF LIABILITY ACT ALSO PROVIDES A SEPARATE BASIS FOR ADMIRALTY JURISDICTION.

An additional basis of maritime jurisdiction exists in this case through the Limitation of Liability Act, 46 U.S.C. § 183, *et seq*. ("Limitation Act"). Respondent properly raised this issue below, both in the District Court, which rejected the argument, and in the Seventh Circuit, which chose not to address the contention because it concluded 28 U.S.C. § 1333(1) adequately supported jurisdiction. *Great Lakes Dredge & Dock Co.*, 3 F.2d at 230 n. 8. This Court also chose not to address this issue in *Sisson*, 497 U.S. at 359 n. 1. The MLA urges the Court to resolve whether the Limitation Act does confer jurisdiction, as this will help to simplify the jurisdictional inquiry in future cases.

A. The Limitation Act Establishes A Basis Of Admiralty Jurisdiction Separate From Admiralty Jurisdiction In Tort.

Congress, by enacting 46 U.S.C. § 183, *et seq*. to enable vessel owners to limit their liability, supplemented the federal court's admiralty jurisdiction. Immediately after Congress first passed the Limitation Act in 1851, it was considered that the Act "embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts." *Richardson v. Harmon*, 222 U.S. 96, (1911). In 1884, Congress amended the Act by adding § 189, which in part provides that "the individual liability of a shipowner shall be limited to the proportion of *any or all debts and liabilities* . . . ." 222 U.S. at 101 (Emphasis added).

Richardson was the first case in which this Court considered the meaning of § 189. The vessel owner in *Richardson* sought to limit the liability arising out of an allision between his vessel and the abutment of a railway drawbridge. At that time, admiralty courts had no jurisdiction in tort over damage communicated from ship-to-shore, and the district court accordingly dismissed the limitation petition for want of admiralty jurisdiction.

This Court reversed, holding that the 1884 amendment expanded the scope of the liabilities subject to limitation to include "all claims arising out of the conduct of the master and crew, *whether the liability be strictly maritime or from a tort non-maritime* . . . ." *Richardson*, 222 U.S. at 106 (Emphasis added). The claimant (bridge owner) argued that Congress' specification that limitation was open to "any and all debts and liabilities that his individual share of the vessel bears" was only meant to encompass obligations *ex contractu* and not non-maritime liabilities in tort. This Court rejected this argument, stating that "the addition of the words 'and liabilities' would be tautology unless meant to embrace liabilities not arising from 'debts.' " *Id*. at 104. According to this Court, "we therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts' not theretofore included." *Id*. at 106.

The conclusion is inescapable that because the right to limitation under § 189 does not depend on the *maritime*

nature of the liability, jurisdiction under the Limitation Act is not merely coextensive with the general admiralty jurisdiction in tort. According to this Court's interpretation of § 189, under *Richardson*, a federal court's admiralty jurisdiction in tort and its admiralty jurisdiction under the Act are necessarily two separate bases of admiralty jurisdiction, the latter extending jurisdiction *to any and all* liabilities arising out of the conduct of the vessel, even non-maritime. This point is emphasized by the fact that two weeks after this Court decided *Richardson*, it handed down *Martin v. West*, 222 U.S. 191 (1911), in which it held that there was no admiralty jurisdiction over a claim brought by a bridge owner against a shipowner whose vessel had collided with and damaged the claimant's bridge. Had the shipowner sought relief under the Limitation Act, however, jurisdiction would have existed.

B. *Richardson v. Harmon* Remains Good Precedent.

Richardson remains viable precedent because this Court has recognized throughout this century that the Act contains an independent, statutory grant of jurisdiction:

> In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances *all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not.*

THE HAMILTON, 207 U.S. 398, 406 (1907) (emphasis added).

> But this limitation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (*Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 27 L.Ed. 1038, 3 S.Ct. Rep. 379, 617) to do what is exceptional in a court of admiralty—to grant an injunction, *and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court* (Benedict, *Admiralty*, 5th ed. § 70, note 97).

Hartford Accident & Indemnity Co. v. Southern Pacific, 273 U.S. 207, 218 (1926) (Emphasis added). More recently, the Court reaffirmed that "the limitation extends to tort claims even where the tort is non-maritime." *Just v. Chambers*, 312 U.S. 383, 386 (1941).[27]

The precedents of this Court make clear that the Limitation Act is more than a mere procedural device and is broader than judicially developed parameters of maritime jurisdiction. There is admiralty jurisdiction under the Limitation Act if (1) the structure seeking the benefit of the Act is a vessel; (2) the liabilities exceed the value of the owner's interest in the vessel; (3) the person or entity seeking limitation is the owner of the vessel; and (4) there is more than one claimant. This case meets all of these prerequisites.

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[27] Following the lead of this Court, other cases have confirmed the jurisdiction of admiralty courts in limitation cases where the claims asserted were non-maritime. *THE ATLAS NO. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *THE WICHITA FALLS*, 15 F. Supp. 612 (S.D. Tex. 1936); *Tracy Towing Line v. Jersey City*, 105 F. Supp. 910 (D.N.J. 1952); *The City of Bangor*, 13 F. Supp. 648 (D. Mass. 1936); *In Re Pennsylvania R. Co.*, 48 F.2d 559 (2d Cir.), *cert. denied*, 284 U.S. 640 (1931); *In Re Highland Nav. Corp.*, 24 F.2d 582 (S.D.N.Y. 1927); *THE NO. 6*, 241 F. 69 (2d Cir. 1917). *See also United States v. Matson Nav. Co.*, 201 F.2d 610 (9th Cir. 1953) ("The Supreme Court upheld the Act in *Richardson v. Harmon, supra*, even though it considered the Act as an extension of admiralty jurisdiction to theretofore non-maritime torts.").

C. *Executive Jet* Did Not Change The Jurisdictional Effect Of § 189 Of The Limitation Act.

The decision of this Court in *Executive Jet* establishing a "maritime nexus" test in addition to the traditional "situs" requirement for admiralty jurisdiction in tort did not change the meaning placed upon § 189 of the Limitation Act by the Court sixty years earlier in *Richardson v. Harmon*. The Court's sole concern in *Executive Jet* was the scope of a federal court's admiralty jurisdiction in tort under 28 U.S.C. § 1333(1). 409 U.S. 249, 251 (1972).

The rule formulated by the Supreme Court in *Executive Jet* affects the rule of *Richardson* only if *Richardson* was a case which decided some aspect of admiralty jurisdiction over a maritime tort. On the contrary, *Richardson* expressly held that Congress intended the Limitation Act to apply to maritime *and non-maritime torts*. 222 U.S. at 106. *Richardson* did not hold that § 189 of the Act effectively expanded admiralty jurisdiction *in tort* to cover injuries which originated on navigable waters but were consummated on land. Rather, the *Richardson* Court construed the Act itself as providing a separate source of admiralty jurisdiction which defendant shipowners might invoke irrespective of the maritime nature of the liability sought to be limited.

Moreover, *Executive Jet* did not propound jurisdictional prerequisites for all species of admiralty jurisdiction. First, it was limited to an aviation accident. Second, the Court expressly held that "*in the absence of legislation to the contrary*, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." 409 U.S. at 274. (Emphasis added). Clearly, the Court recognized that its new test did not apply to Congressional legislation which conferred additional jurisdiction in admiralty.

CONCLUSION

The MLA urges this Court to adopt a modified "situs" test for admiralty tort jurisdiction covering all torts which (1) occur on navigable waters and (2) which occur on or are caused by a vessel. Only by adopting this test can the Court end the undeniable confusion which presently characterizes maritime jurisdictional inquiries by the lower courts, where little or none existed before. This test is in keeping with the constitutional grant of admiralty and maritime jurisdiction to the federal courts, which must be given the broadest interpretation to affect its purpose of providing a uniform set of laws for the use of navigable waters by vessels. In their confusion, the lower courts have lost sight of this purpose.

The proposed "situs" test is also consonant with Congress' consistent expansion of the admiralty jurisdiction in amending the Limitation of Liability Act to cover maritime and non-maritime liabilities, and in passing the Admiralty Extension Act, overruling *The Plymouth* and *Martin v. West*. If a vessel is not involved in an incident, then admiralty jurisdiction should be determined through a modified *Sisson* test which assesses (1) whether the wrong occurred upon navigable waters and (2) whether the incident posed a hazard to use of navigable waters.

Jurisdiction exists in this case under the old "situs" test, the modified "situs" test, the *Sisson* test, the Admiralty Extension Act, and the Limitation of Liability Act. If this case is not within admiralty jurisdiction, no case should be. The activity of the vessel resulted in *closure* of a navigable waterway, the free passage of which is the very essence of the maritime interest.

For all of the foregoing reasons, the decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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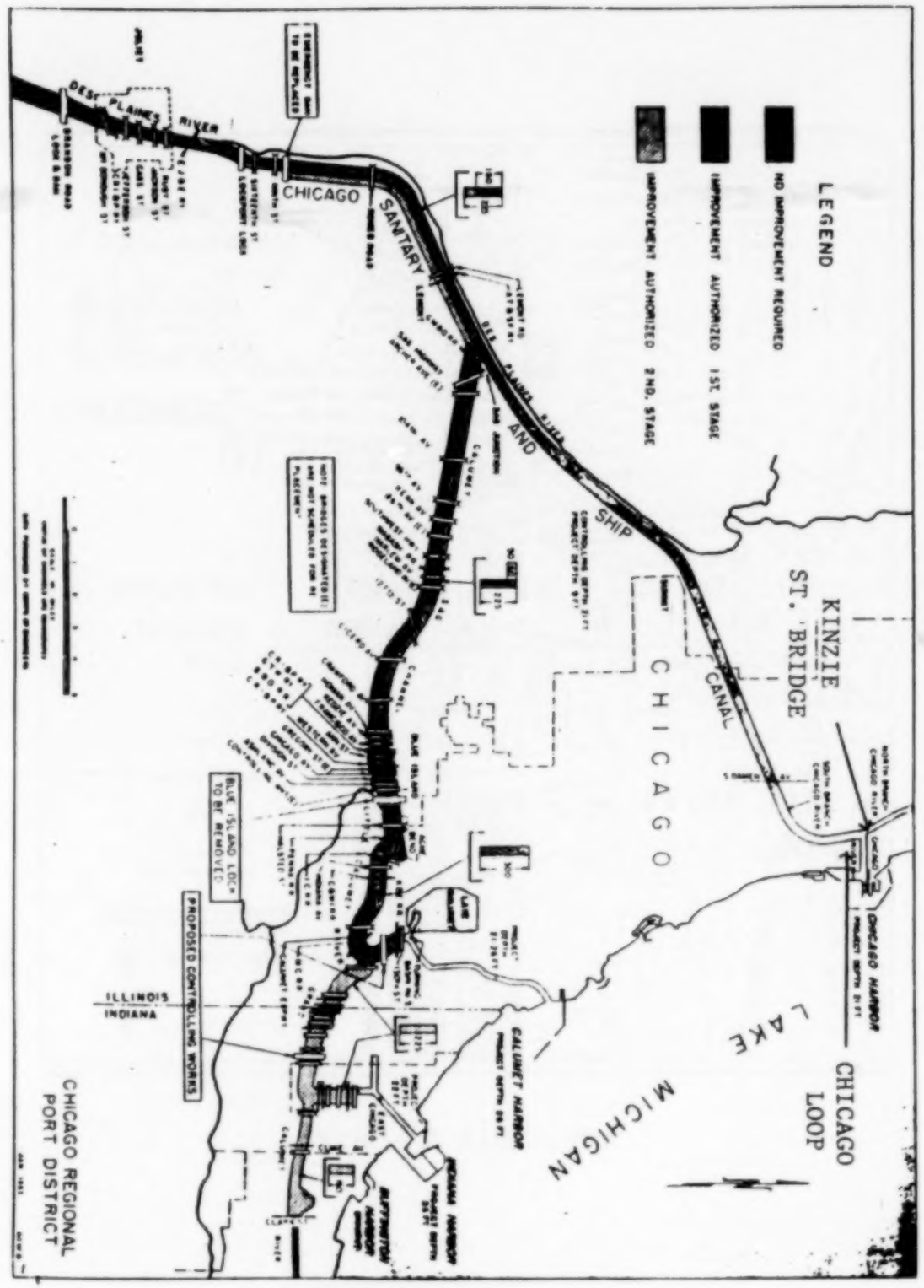

APPENDIX A — p. 1